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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 2048

BEARD-LANEY, INC.,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ASSOCIATED PETROLEUM CARRIERS,

Defendants

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT IN THIS CASE.

The Plaintiff-Appellant, presenting herewith its petition for appeal, now files this statement as the basis upon which it contends that the Supreme Court of the United States has jurisdiction on direct appeal to review the final Order, Decree or Judgment entered herein and in which it is contended that the Court should exercise its jurisdiction.

A. The Statutory Provisions Believed to Sustain Jurisdiction

This is an appeal from the final Order, Decree or Judgment of a three-Judge District Court, denying, after notice and hearing, injunctive relief and dismissing the suit to set aside and enjoin an Order of the Interstate Commerce Commission in a civil action brought as required by 28

U. S. C. A. 2325. The provisions of 28 U. S. C. A. 1253 provide for and authorize direct appeal from such a final Order, Decree or Judgment of a District Court of three Judges to the Supreme Court.

In view of the express provisions of the foregoing statutes it is contended that the Supreme Court has jurisdiction on direct appeal to review this final Order, Decree, or Judgment. *Amerian Trucking Association* v. *United States,* 326 U. S. 77, 89 L. Ed. 2065.

B. The Date of the Order, Decree or Judgment Sought to Be Reviewed, and the Date upon Which the Application for Appeal Is Presented.

The final Order, Decree or Judgment sought to be reviewed was entered of record on March 10, 1949. The petition for appeal is being presented and filed on April 26, 1949.

C. Nature of Case and Issues Involved

The plaintiff, appellant herein, is engaged in the business of transporting petroleum products in bulk in tank trucks as a common carrier in interstate or foreign commerce, pursuant to certificate of public convenience and necessity heretofore issued to it by the Interstate Commerce Commission. The plaintiff operates, in part, in the same territory in which the applicant, Associated Petroleum Carriers, proposes to operate under the certificate of public convenience and necessity granted to it by the Interstate Commerce Commission, and the order of the Commission granting such certificate is being attacked in this proceeding. The application of Associated Petroleum Carriers stems from and is to supersede an operation conducted under temporary authority granted by the Commission on June 2, 1942 to War Emergency Cooperative Association,

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generally referred to as WECA. WECA was organized at the request of the Office of Defense Transportation and under its sponsorship. At the time of organizing WECA it was agreed that, if protestants in the proceedings before the Commission agreed to and went along with the organization of WECA (which was done), the operations of WECA would be for the duration of the War only, would not work to the detriment of the protestants or have any effect on permanent authority. The service to be rendered by Associated Petroleum Carriers under said certificate is directly competitive with the service which the plaintiff renders in the territory in which it serves.

After the Interstate Commerce Commission granted to the Carrier the certificate of public convenience and necessity in question the plaintiff filed its bill of complaint in the United States District Court for the Eastern District of South Carolina against the United States, the Interstate Commerce Commission and Associated Petroleum Carriers seeking to annul and set aside the order of the Commission wherein Associated Petroleum Carriers was granted the right to operate such competitive service under said certificate.

Upon the hearing of the cause by the District Court that Court decided against the plaintiff on all issues presented and gave judgment upholding the order of the Interstate Commerce Commission.

The bill of complaint in substance raised the following issues:

(a) The Commission failed to apply the statutory standards for determining public convenience and necessity which Congress has prescribed, and particularly failed to consider the failure of the applicant to show the inadequacy of the existing service, the ability of the plaintiff to furnish adequate service in the territory in which it

professes to serve, and whether the granting of the application would secure to the public the benefit of an improved service without being unduly prejudicial to the existing service.

(b) Plaintiff contended that the Commission in issuing the certificate in question failed to apply the proper legal criteria for determining public convenience and necessity and issued said certificate merely on the showing of public convenience or desire.

(c) Plaintiff contended that the Commission failed to make the basic or essential findings necessary to support the ultimate finding of public convenience and necessity, and that the order complained of was based upon argumentative conclusions or negative findings, and without evidence to support the ultimate finding of public convenience and necessity.

(d) Plaintiff contended that the Commission failed and refused to adequately consider and give effect to the undisputed evidence that the interlocking interest of the stockholders of Associated Petroleum Carriers and Coastal Terminals, Inc., constituted a combination or conspiracy in restraint of trade, in violation of the National Transportation Policy, 54 Stats. 899, 49 U. S. C. A., preceding Section 1, and that such combination or conspiracy is also contrary to the provisions of the Sherman Anti-trust Act, 15 U. S. C. A., Secs. 1-7, 15 Note.

D. Rulings Below

With respect to all the issues raised the Court below held that the Commission had made sufficient essential or basic findings to support the ultimate finding of public convenience and necessity, and further held that all matters complained of were in the administrative discretion of the Interstate Commerce Commission.

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E. The Questions Presented Are Substantial and Are Such as to Bring the Case Within the Jurisdictional Provisions on Which the Appellant Relies.

In the case here presented for review, the District Court concluded that the determination of the question as to what constituted a sufficient showing of public convenience and necessity under the statute was a matter wholly within the administrative discretion of the Commission. The case is unusual in that upon the same record the Commission reached two contradictory conclusions. Plaintiff contends that in finding that the public convenience and necessity would be served by approval of the application the Commission failed to apply the proper criteria for the determination of that question, and particularly failed to consider the failure of the applicant to show the inadequacy of the existing service, the ability of the plaintiff to furnish adequate service in the territory in which it serves, and whether the granting of the application would secure to the public the benefits of an improved service without being unduly prejudicial to the existing service. *Fine & Jackson Trucking Corp.* v. *U. S.*, 65 Fed. Supp. 443; *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 86 L. Ed. 971; *Inland Motor Freight* v. *U. S*, 60 Fed. Supp. 520; *Florida* v. *U. S.*, 282 U. S. 194, 75 L. Ed. 291; *Hudson Transit Lines, Inc.*, v. *U. S.*, U. S. D. C., So. Dist. of N. Y., decided April 15, 1948, 82 Fed. Supp. 153.

This phase of the issue presented called for a review of the Commission's policy and a determination of whether the Commission has made distinctions which Congress did not make and has applied the proper criteria within the frame of the statute which the Commission administered. On these issues the case is similar to those passed on by the Supreme Court in *Eastern Central Motor Carriers Association* v. *United States*, 321 U. S. 194, 88 L. Ed.

668, decided February 7, 1944, and *Carolina Freight Carriers Corp.* v. *United States,* 315 U. S. 475, 86 L. Ed. 971, decided March 2, 1942, in which cases this Court held that the Commission's reports did not contain a sufficient showing upon which it could be determined whether the Commission had applied proper criteria, and the Commission was therefore reversed.

There was and is presented the further question as to whether the Commission made the requisite statutory findings or made findings without evidence, or substituted conclusions or inferences for findings, or made negative findings, and on that issue the case is similar to the cases of *Yonkers* v. *United States,* 320 U. S. 685, 88 L. Ed. 399, decided January 3, 1944; *United States* v. *Chicago N. St. P. & P. Co.,* 294 U. S. 499, 79 L. Ed. 1023; *Florida* v. *United States,* 282 U. S. 194, 85 L. Ed. 291; *United States* v. *B. & O. R. Co.,* 293 U. S. 454, 79 L. Ed. 587, in which the Supreme Court found that the Commission had not made the proper findings.

Plaintiff contends that the District Court, in concluding that the Commission had made the basic or essential findings necessary to support the ultimate finding of public convenience and necessity obviously supplied the same by inference or implication and by a process of spelling out and choosing between two conflicting inferences in violation of the rule announced by the Supreme Court in *United States* v. *Carolina Freight Carrier Corp.,* 315 U. S. 475, 86 L. Ed. 971; and *Florida* v. *United States,* 282 U. S. 194, 75 L. Ed. 291.

There is presented the further question as to whether the combination of jobbers, distributors, dealers or so-called agents engaged in buying or selling petroleum products as stockholders in control of applicant, Associated Petroleum Carriers whose charter authorizes it to engage in

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> "the transportation of petroleum by motor truck together with the buying, selling and repairing of trucks and such other equipment as may be necessary and incidental to the conduct of such business;"

and whose stockholders also own the stock and are in control of Coastal Terminals, Inc., a corporation whose charter authorizes it, among other things, to engage in

> "the buying and selling of petroleum and automotive products, both wholesale and retail; * * * the warehousing and storage of petroleum products in bulk * * * to buy and sell * * * petroleum equipment * * *;"

and the sale of such trucks, automotive equipment and petroleum products to jobbers, distributors, dealers or so-called agents engaged in buying and selling petroleum products and the leasing of such trucks and automotive equipment to Associated Petroleum Carriers by the purchasers thereof for transporting lessor's petroleum products, and for the public generally, is the creation and actual existence of a combination or conspiracy in restraint of trade as well as a combination or conspiracy to monopolize the sale of such trucks and automotive equipment and the marketing and transportation of said petroleum products in the States involved, in violation of the National Transportation Policy and the Sherman Anti-Trust Act, Sections 1-7, 15 Note. And also whether the defendant, Associated Petroleum Carriers, through its stockholders, who are also the stockholders of Coastal Terminals, Inc. and the individual owners of retail filling station outlets, have combined or conspired to acquire and maintain power and competitive advantages, recognized by the Commission to exist, to eventually exclude competitors such as appellant from any part in the trade or commerce within the States involved.

15 U. S. C. A., Secs. 1-7, 15 Note; *U. S.* v. *Griffith*, 334 U. S. 100; *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, 90 L. Ed. 1575; and *Standard Oil Co. of N. J.* v. *U. S.*, 221 U. S. 1, 55 L. Ed. 619.

Statement Respecting Opinion

The Court below delivered a written opinion, filed findings of fact and conclusions of law, and a decree denying the injunctive and other relief prayed for in the Complaint, and dismissed the suit. Copies of these findings, conclusions, opinion and decree, together with copies of the reports of the Interstate Commerce Commission, are attached to this jurisdictional statement.

All of which is respectfully submitted.

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April 26, 1949.

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APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil No. 2048

BEARD-LANEY, INC., *Plaintiff*,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and ASSOCIATED PETROLEUM CARRIERS, *Defendants*

On Application to Enjoin and Set Aside an Order of the Interstate Commerce Commission

Argued February 7, 1949. Decided

Before Parker, Circuit Judge, and Wyche and Timmerman, District Judges

Frank A. Graham and E. W. Mullins, Attorneys for Plaintiff; Allen Crenshaw, Attorney, Ben Scott Whaley, U. S. Attorney, Edward M. Reidy, Assistant Chief Counsel, for Interstate Commerce Commission; William D. McFarlane, Special Assistant to the Attorney General, and Herbert A. Bergson, Assistant Attorney General, for the United States; L. A. Odom, C. W. Tillett, Frank J. Bostick and Joseph H. Blackshear, Attorneys for Associated Petroleum Carriers.

PARKER, Circuit Judge:

This is a suit to set aside and enjoin an order of the Interstate Commerce Commission granting to Associated Petroleum Carriers a certificate of public convenience and necessity to operate as a common carrier by motor vehicle, in interstate or foreign commerce, of petroleum products, in bulk, in tank trucks over irregular routes, from Wilmington, Fayetteville, Morehead City and New Bern, N. C., Charleston, S. C., Savannah, Ga., and terminals in Georgia, North Carolina and South Carolina on the pipe lines of the Southeastern Pipe Line Company and the Plantation Pipe

Line Company to all points in Georgia, North Carolina and South Carolina. A special court of three judges has been convened pursuant to statute, 28 USCA 2284 (1) and 2325, to hear the application for interlocutory injunction, the case has been heard upon the pleadings and record made before the Commission and the briefs and arguments of counsel, and by consent of parties the cause has been submitted upon the merits for final decree.

The application of the Associated Petroleum Carriers, hereafter referred to as the applicant, stems from and is to supersede an operation conducted under temporary authority granted by the Commission on June 2, 1942, to the War Emergency Cooperative Association, hereafter referred to as WECA, to transport petroleum products in bulk in tank trucks between points in North Carolina, South Carolina, Georgia and Florida. WECA was organized at the request or suggestion of the Office of Defense Transportation and under its sponsorship. It was an association of former private carriers domiciled in North Carolina, South Carolina and Georgia, some of whom were jobbers, or distributors of petroleum products and others were operating as contract Carriers under state authority. They hauled petroleum products from the ports and pipe line outlets to consumers and distributors in the territory served, using approximately 148 petroleum carrying motor vehicles in the service. Applicant proposed to acquire this equipment and to carry on the business which had been handled by WECA. Its application was opposed by fourteen motor carriers operating within the three states named and by the southern rail carriers. Only one of these protestants, however, has come into court asking that the action of the Commission be enjoined. This protestant is Beard-Laney, Inc., which has a license to transport from only seven of the twenty-six points of origin within the territory.

The application for the certificate of convenience and necessity was filed in August 1945, and was referred to a Joint Board, pursuant to section 205 of the Interstate Commerce Act as amended, 49 USCA 305, composed of representatives chosen from the Public Service Commission

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of North Carolina, South Carolina and Georgia. After a full hearing this Joint Board filed a comprehensive report on April 8, 1946, finding the facts in meticulous detail and recommending that the application for a certificate of convenience and necessity for operation in interstate commerce within the designated territory be granted. After setting forth the facts showing the need of the service which applicant proposed to render, the Joint Board replied to the contention that the granting of the application would result in diverting traffic from protestants in the following language:

> "Protestants overlook the fact that the presently authorized carriers are not in a position to render the service proposed by applicant. A few are contract carriers who render a specialized service under individual contract and agreements, are not required to serve the public, and may pick and choose among shippers. A shipper is entitled to dependable motor carrier service which is not subject to the contingency of negotiating a satisfactory agreement for contract carriage or the burden of assuming the obligations of such a relationship. Rayfield Contract Carrier Application, 21 M. C. C. 214.
>
> "In the past, applicant's predecessor, WECA, and the protestants have been operating within the southeast, some under temporary authority. There has been no showing that any common carrier has suffered substantial loss of revenue or its service has been impaired by reason of the present competitive situation. There has been no complaint by any shipper witness that the service performed by any common carrier protestant has been rendered inadequate, but on the contrary, the record is replete with statements to the effect that protestants gave prompt and efficient service. The granting of the instant application is merely a substitution of applicant for WECA. The status quo of the service and the territorial scope of the operation for all practical purposes is to be maintained. Despite this, protestants would have the Joint Board believe that

the proposed operation would create unfair and destructive competition. The evidence will not support such a finding.

"The Joint Board is convinced that the grant of authority to applicant, paralleling, in some instances, that of other common carriers will result in a healthy competitive situation and will tend to foster sound economic conditions in the transportation industry.

• • • • • • •

"Here is a motor carrier operation conceived during a period of dire necessity and for the purpose of meeting that need, It is now being carried on under temporary authority and because of changed conditions brought about partly, at least, by that emergency, is proposed for the future. An attempt is being made by this applicant to harvest the fruits of endeavor and business acumen and to preserve for the people in the Southeast a transportation system which through the trying years of the war has reached a high degree of perfection. Authority is sought to continue a service to which the shipping public has grown accustomed and which will utilize equipment heretofore owned and operated by private carriers and used in the transportation of their own commodities. Moreover, the service will be subject to the regulatory powers of the Federal government and insofar as intrastate commerce is concerned to the regulatory powers of the respective state governments, the advantages of which will inure to the benefit of the public as a whole.

Exceptions were filed to the recommendations of the Joint Board and the matter came on to be heard before Division 5 of the Interstate Commerce Commission, which on June 30, 1947, filed its unanimous report, finding the facts as they had been found by the Joint Board with no variations of any consequence, but holding that because 58 of the 66 stockholders of applicant were "jobbers, distributors, dealers or so called agents engaged in buying or selling petroleum products," the granting of the application would be "inconsistent with the public interest," and also that applicant had failed to meet the burden of show-

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ing "that the proposed operation would serve a useful purpose responsive to a public demand or need, and that the public need cannot or will not be met as well by the existing carriers." Applicant filed a petition for reconsideration, which was granted; and on February 19, 1948, Division 5 filed another report upon the same evidence adopting the primary findings of fact contained in its original report, with one or two changes, but reversing itself by a vote of two to one as to the conclusions drawn therefrom. With respect to the need for the service and the adequacy of existing facilities the report said:

> "In its petition applicant points out that the record fails to show any existing permanent common carrier authority to operate from many of the sources of supply to the destination territory here involved. A *reexamination of the facts in this case shows this to be true.* It will be noted from the foregoing that neither of the carriers showing a capacity for handling additional traffic is authorized to operate from Charleston, Morehead City, New Bern, Brunswick, or any of the pipe-line terminals on the Plantation pipe line except one is authorized to serve Thrift and Camp Croft and from these latter points its service is limited to destinations in North Carolina from Camp Croft and to destinations in South Carolina from Thrift. The other carrier's permanently authorized interstate operations are entirely within Georgia, and its operations there are limited to points within 125 and 115 miles of origin.
>
> "It is conceded by all that the consumption of petroleum products during the war was abnormal. It is open to conjecture whether postwar transportation requirements will equal or exceed those of 1940. Many witnesses in support of the application express the belief that there will be a continued increase in consumption of petroleum products by reason of conversion of heating plants in homes, hotels, and commercial establishments from coal to fuel oil, mechanization of farming equipment, increased use of fuel oil in tobacco barns and growth of the aviation industry. Protestants attempt to show that any additional traffic load

that may result from increased use of petroleum products, which increase they do not concede to be a fact, can easily be handled with less transportation equipment than was necessary in 1940 due to the advent of the pipe lines, whihc has materially shortened the average length of haul, and increased carrying capacity of tank trucks and trailers which are now generally in use. They furnished a traffic study which, for the reasons stated in our prior report is subject to serious question, in which they reach the conclusion that the 1946 volume of movement would require about 168 tractor-trailers.

"While protestants have shown that they are in a position to handle additional tonnage, *it should be noted that the combined total of the equipment operated by them approximated that operated by WECA at the time of the hearing.* During a six week period immediately preceding the hearing WECA transported 39,753,500 gallons or approximately 9,900 truckloads from pipe line outlets, ocean terminals, and Fayetteville. *No common carrier service is shown to be available to serve the entire territory in which a definite need for* service is established by shipper witnesses, nor is it shown that existing carriers can absorb the *substantial tonnage transported by WECA in the territory involved.* While the representative of one shipper stated that a need existed for service between its bulk plants located at various points in the three states, no such transportation is shown ever to have been performed by WECA nor is any definite reference made to any particular time when such service was required by the shipper. *We conclude that we erred in finding in our prior report that public convenience and necessity did not require the proposed service to the extent of operation from coast terminals, pipe line outlets, and Fayetteville, N. C., to points in the territory covered by the application.*" (Italics supplied).

The Commission carefully weighed the matter of applicant's affiliation with the petroleum industry and the pub-

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lic interest thus involved in connection with the public need for the service which applicant proposed to render, saying:

> "In our prior report we also found that the proposed operation, by reason of applicant's affiliation with the petroleum industry, would be inconsistent with the public interest and the national transportation policy. We adhere generally to the principles enunciated therein, but, in view of the public need for at least a part of the proposed service which has been shown, it becomes necessary to weigh again the objections to the granting of authority to applicant against the advantages accruing to the shippers and consumers through applicant's furnishing of a needed transportation service.
>
> "Protestants contend that applicant will engage in unfair competition with existing for-hire carriers of similar commodities and that the plan of operation involves an indirect rebate, violates applicable Federal Laws, tends to create a monopoly, lessens competition, is in restraint of trade, and that any person desiring to engage in the transportation of similar commodities in the southeast need not apply for a certificate, but need only approach applicant and make a satisfactory deal without consulting this Commission. It does not appear that the present competitive relation, as it now exists between WECA and protestants, would be materially changed by applicant entering the field in place of WECA. There has been no showing that any common carrier has suffered any substantial loss of revenue or that its service has been impaired by reason of the present competitive situation. Generally speaking, there is no claim by anyone that a new service is now needed, but the record is replete with evidence that WECA has been supplying a service upon which the shipping public relies and that this service cannot be withdrawn, through denial of this application, without detriment to the shipping public. We have carefully considered each of the arguments outlined above, but find no evidence to show that applicant will be in fact, or that WECA has been, in violation of any provision of the Interstate Com-

merce Act or other Federal statutes or any of our rules and regulations as alleged.

"We are inclined to minimize the danger to which protestants point in establishing a precedent under which enterprising promoters might organize corporations and sell stock to persons who control traffic in other commodities such as textiles, beverages, mercantile goods, drugs, food products, and numerous other commodities. The situation in which shippers control or dominate a carrier is not novel. While it appears that other carriers may be at some competitive disadvantage, we are inclined to place more emphasis upon the supplying of an essential service than upon the possibility of injury to competing carriers. Applicant, of course, will be expected to comply strictly with the requirements of the act and our rules and regulations thereunder, and in the event of any unlawful action on its part appropriate remedies are available to aggrieved parties."

Division 5 concluded its report with a specific finding that present and future convenience and necessity require operation by applicant as a common carrier of petroleum products in interstate and foreign commerce within the territory designated. Protestants filed a petition for reconsideration; but this was denied by the Commission at a joint session, with the result that the order of Division 5, with one member dissenting, became effective as the order of the entire Commission, whereupon this suit for injunction was instituted by Beard-Laney, Inc., one of the protestants.

The principal position of plaintiff is that there are no adequate findings of fact upon which to base the order of the Commission and no sufficient evidence to support such findings; but we think that this position is wholly lacking in merit. The portions of the last report, which we have quoted above, are certainly sufficient, when taken in connection with the detailed findings of evidentiary facts preceding them, as findings that the service which applicant proposes to render is needed by the public, that it cannot be furnished by other carriers operating within the territory and that it will not result in destructive competition

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hurtful to the public interest. We may not ignore these findings because made in the form of a narrative order, rather than in separately numbered paragraphs as formerly required by Equity Rule 70½ or Rule 52 of the Federal Rules of Civil Procedure, since these have no application to the Commission. Chicago, B. & Q. R. Co. *v.* United States, 60 F. Supp. 580, 584; United States v. B. & O. R. Co., 293 U. S. 454, 464.

There can be no question that the evidence before the Commission amply supports its findings. Witness after after witness testified as to the need for the service; documentary evidence shows that the operating authority of the protesting carriers is so limited that they cannot serve the territory allotted to applicant; and the fact that WECA is now handling such a large portion of the traffic is sufficient basis for the finding that the substitution of applicant in its place will not result in competition hurtful to the public interest.

We are not impressed by the argument that, because it is not shown that protestants could not increase their facilities to take care of the need which would arise upon the withdrawal of WECA, there is no basis for granting a certificate, to applicant. As stated above, protestants were not authorized to render service throughout the territory; and, quite apart from this, there is nothing in law or in reason which requires that the Commission permit those already in the field to absorb the business which would be relinquished by WECA rather than give the public the benefit of the competition which would result from the licensing of applicant. We have considered what was said by Judge Schwellenbach in the case of Inland Motor Freight v. United States, 60 F. Supp. 520, but, with all respect, we are not not persuaded of the correctness of the view there indicated. On the contrary, we think that for the courts to enforce any such rule, in reviewing orders of the Commission, is for them to misconceive their function. It is for the Commission, not the court, to say what public convenience and necessity requires and whether these will be better served by licensing an additional carrier than by permitting those already licensed to expand their facilities. As said by Mr. Justice Rutledge, speaking for the Supreme

Court, in the recent case of United States *v.* Pierce Auto Freight Lines, 327 U. S. 515, 536:

> "The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations of others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

Directly in point on the question here under discussion is the case of I. C. C. v. Parker, 326 U. S. 60, 69, where the contention was made that there was no basis for issuing a certificate to a railroad to operate a motor line since no evidence was offered as to the inadequacy of the motor carriers then holding certificates to serve the railroad's need. In rejecting this contention, the court said:

> "The contention of appellees, protestant motor carriers, is that since no evidence was offered as to the inadequacy of the presently duly certificated motor carriers to serve the railroad's need, there was a failure of proof as to convenience of and necessity for a new motor truck operation in the territory. Public convenience and necessity should be interpreted so as to secure for the Nation the broad aims of the Interstate Commerce Act of 1940. Cf. New England Divisions Case 261 U. S. 184, 189; I. C. C. v. Railway Labor Assn. 315 U. S. 373, 376-77; United States v. Lowden, 308 U. S. 225, 230; Texas & N. O. R. Co. v. Northside Belt R. Co., 276 U. S. 475, 479. In protestants' view a certificate of convenience and necessity should not be granted to railroads for motor truck operation when existing motor carriers are capable of rendering the same service Appellants take the position that this precise issue need not be decided in this case. They look

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upon the application as asking for authority to improve 'an existing service.' We think that it was for a motor service to improve an existing rail service. Consequently, the issuance of the certificate is subject to all the requirements of any other application for a certificate for operation of motor lines. Since, however, on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers, 42 M. C. C. 725-26, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue. The public is entitled to the benefits of improved transportation. Where that improvement depends in the Commission's judgment upon a unified and limited rail-truck operation which is found not 'unduly prejudicial' to motor carrier operations, the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service."

See also United States v. Carolina Freight Carriers Corporation, 315 U. S. 475; Lang Trans. Co. v. United States, 75 F. Supp. 915, 930; A. B. & C. Motor Trans. Co. v. United States, 69 F. Supp. 166, 169; McLean Trucking Co. v. United States, 63 F. Supp. 829; Carolina Scenic Coach Lines v. United States, 56 F. Supp. 801, Id. 323 U. S. 678; Turner v. United States, 56 F. Supp. 798, Id. 323 U. S. 674; Bush Transfer v. United States, 53 F. Supp. 640; Bondurant v. United States, 50 F. Supp. 704, 706; Virginia Stage Lines v. United States, 48 F. Supp. 79; Davidson Transfer & Storage Co. v. United States, 42 F. Supp. 215, 219; Id. 317 U. S. 587. In the Bondurant case, supra, the rule applicable is thus stated by another three-judge court of this Circuit, viz:

"We cannot say that the Commission's findings are not supported by the evidence, that they involve any error of law or that they are so arbitrary or unreasonable as to amount to an abuse of discretion. This being true, the relief prayed for must be denied. 'This

court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.' Virginian Ry. v. United States, 272 U. S. 658, 665, 666, 47 S. Ct. 222, 225, 71 L. Ed. 463; Interstate Commerce Commission v. Union Pac. R. Co., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

The rules to be applied in reviewing the order of the Commission are not different because that order resulted from a reversal of a prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of the division, which received the approval of the Commission, was the final and definitive action of the Commission, which is what we are authorized review; and it is to be reviewed in the same way and under the same limitations as other reviewable orders. We may not substitute our judgment for that of the Commission because upon a rehearing and fuller consideration of the facts it has arrived at a different conclusion from that which its hearing division had first expressed. Lang Trans. Co. v. United States, 75 F. Supp. 915, 925.

Plaintiff contends that the application should have been denied on the ground that it is not in the public interest that persons engaged in the sale or distribution of petroleum products have an interest as stockholders in a common carrier licensed to transport such products in interstate commerce, and that licensing a carrier where there is such stock ownership results in unfair competition tending to monopoly. This, however, is a matter to be weighed by the Commission along with other matters in determining what is required by public convenience and necessity; and the reports of the Commission show that it was given full consideration and weighed against other matters deemed of greater importance in arriving at a conclusion. In this connection it is to be noted that the prohibition of 49 USCA 1 (8) against transporting property

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owned by the carrier applies only to railroads and that an effort to amend it so as to make it applicable also to motor carriers was made when the Transportation Act of 1940 was under consideration by Congress but was abandoned. See United States v. South Buffalo R. Co., 333 U. S. 771, 776, 790, and note 10 on 790. There is nothing in the law, therefore, which forbids a motor carrier to transport commodities which it owns; and, even if there were, such provision would not prohibit the transportation of property owned by stockholders (United States v. South Buffalo R. Co. supra) and would furnish no compelling reason which would preclude the granting of a certificate of convenience and necessity where in the opinion of the Commission the public interest required it.

For the reasons stated the injunction will be denied and the suit will be dismissed.

Injunction Denied and Suit Dismissed.

(S.) JOHN J. PARKER,
Chief Judge Fourth Circuit.
(S.) C. C. WYCHE,
United States District Judge, Western District of South Carolina.
(S.) GEORGE BELL TIMMERMAN,
United States District Judge, Eastern and Western Districts of South Carolina.

A True Copy, Attest:

Ernest L. Allen, Clerk of U. S. District Court, East. Dist. So. Carolina. (Seal.)

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil No. 2048

Findings of Fact and Conclusions of Law

BEARD-LANEY, INC., *Plaintiff*,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ASSOCIATED PETROLEUM CARRIERS, *Defendants*.

FINDINGS OF FACT

The Court makes the following findings of fact:

1. The Interstate Commerce Commission, on October 11, 1948, filed its report and order in No. M. C. 106119, in which it granted to Associated Petroleum Carriers a corporation existing under the laws of the State of South Carolina, a certificate of public convenience and necessity authorizing transportation in interstate and foreign commerce, of petroleum products in bulk, in tank trucks, over irregular routes, from Wilmington, Fayetteville, Morehead City and New Bern, N. C., Charleston, S. C., Savannah, Ga., and terminals in Georgia, North Carolina and South Carolina on the pipe lines of the Southeastern Pipe Line Company and the Plantation Pipe Line Company to all points in Georgia, North Carolina and South Carolina.

2. The application of the Associated Petroleum Carriers had been referred to a Joint Board, which made detailed findings of fact and recommended that the application be granted. A Division of the Commission considered this report and made a report of its own, finding the facts and unanimously denying the application, but, upon application for rehearing, granting the rehearing, making supplemental findings upon the same evidence and reversing its original conclusion by a vote of two to one. A petition for further reconsideration was denied, and the final order of the Commission was entered granting the certificate of convenience and necessity as prayed.

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3. The Commission has found that present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate and foreign commerce, of petroleum products in bulk, in tank trucks, over irregular routes, between the destinations noted above, and has supported this ultimate finding of fact by findings of evidentiary facts which support the ultimate finding.

4. That the findings of the Commission are supported by substantial evidence and are not arbitrary or unreasonable.

CONCLUSIONS OF LAW

And the Court sets forth the following as its conclusions of law:

1. That the Commission was acting within the proper limits of its discretion in holding that public convenience and necessity required the issuance to applicant of the certificate attached in this suit.

2. The order of the Commission granting the certificate of convenience and necessity to applicant is a legal and valid order.

3. Injunction should be denied and the suit should be dismissed.

/s/ JOHN J. PARKER,
Chief Judge, Fourth Circuit.

/s/ C. C. WYCHE,
United States District Judge, Western District of South Carolina.

/s/ GEORGE BELL TIMMERMAN,
United States District Judge, Eastern and Western Districts of South Carolina.

This 9th day of March, 1949.

A true Copy, Attest:

Ernest L. Allen, Clerk of U. S. District Court, East. Dist. So. Carolina. (Seal.)

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil No 2048

Decree

BEARD-LANEY, INC., *Plaintiff*,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ASSOCIATED PETROLEUM CARRIERS, *Defendants*.

This cause coming on to be heard before the undersigned, constituting a special District Court of three judges convened pursuant to 28 USCA 2484 (1), and 2325, upon an application for an interlocutory injunction; and being heard upon the evidence taken before the Interstate Commerce Commission and the Report of the Commission, as well as upon the arguments and briefs of counsel; and the cause, by consent of the parties, having been submitted for final decree; and the Court having made its findings of fact and conclusions of law which are filed herewith:

Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the opinion of the Court herewith filed, it is ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed.

This the 9th day of March, 1949.

/s/ JOHN J. PARKER,
Chief Judge, Fourth Circuit.
/s/ C. C. WYCHE,
United States District Judge, Western District of South Carolina.
/s/ GEORGE BELL TIMMERMAN,
United States District Judge, Eastern and Western Districts of South Carolina.

A true copy, attest:

Ernest L. Allen, Clerk, U. S. District Court, E. District of So. Carolina. (Seal.)

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EXHIBIT "D"

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-106119

Associated Petroleum Carriers Common Carrier Application

Submitted May 20, 1946. Decided June 30, 1947

Proposed operation, by reason of applicant's affiliation with the petroleum industry, found to be inconsistent with the public interest and the national transportation policy.

Public convenience and necessity found not to require operation by applicant as a common carrier by motor vehicle, of petroleum products, in bulk, in tank trucks, over irregular routes, between points in North Carolina, South Carolina and Georgia.

Application denied.

L. A. Odom, C. W. Tillett, Joseph H. Blackshear, and *Marshall G. Ligon* for applicant.

Martin Sack, R. J. Reynolds, H. M. Grogan, D. Jordan, *George B. Porter, L. B. Hollowell, Julius T. Sanders, James L. Givan, Wilmer A. Hill, Frank A. Graham, Roy V. Harris* for protestants and interveners.

C. H. Noah for an interested party.

Report of the Commission

Division 5, Commissioners Lee, Rogers, and Patterson

By Division 5:

Exceptions to the recommended order of the joint board were filed by applicant and by certain protestants and interveners, and applicant and another protestant replied. Our conclusions differ from those recommended.

By application filed August 23, 1945, Associated Petroleum Carriers, a corporation, of Spartanburg, S. C., seeks a certificate of public convenience and necessity authorizing

operation, in interstate or foreign commerce, as a common carrier by motor vehicle of petroleum products, in bulk, in tank trucks, between all points in Georgia, North Carolina, and South Carolina,[1] over irregular routes.

A number of motor carriers operating between various points in North Carolina, South Carolina, and Georgia, as well as the southern territory rail carriers, oppose the application. Walker Hauling Company, Petroleum Carrier Corporation and Beard-Laney, Inc., protest the granting of the application. Petroleum Transportation, Incorporated, Warr Brothers, George A. Rheman Company, Inc., W. C. Chaplin, Conway Transport, and Vaughan's Transfer, intervened in opposition to the application. Benton Rapid Express, Dixie Freight Lines, Inc., McDonough Motor Express, Inc., Atlanta-Ashville Motor Express, Inc., and Atlanta-Athens Motor Express, Inc., common carriers of property other than petroleum products, in bulk, intervened solely on the ground that to grant the application would establish a precedent which would adversely affect the motor carrier industry as a whole. They did not present any testimony in support of their position. Atlantic States Motor Lines, Inc., intervened without stating its position. The use hereafter, of the term "protestants" should be understood to mean interveners and protestants, collectively.

This application stems from, and if granted will supersede, an operation being conducted at the present time under temporary authority granted on June 2, 1942, to the War Emergency Cooperative Association, hereafter referred to as WECA, to transport as a common carrier, petroleum products, in bulk, in tank trucks, between all points in North Carolina, South Carolina, Georgia and Florida. The expiration date of that temporary authority has been extended to September 27, 1947. If the instant application is granted, the WECA will withdraw from the transportation field. Applicant proposes to take over the service performed by WECA to the extent that it was and is performed in the area for which authority is sought. WECA was organized

[1] For convenience these three States may sometimes hereinafter be referred to as the southeast.

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at the request or suggestion of the Office of Defense Transportation and under its sponsorship. It was and still is an association of former private carriers domiciled in Georgia, North Carolina, and South Carolina, some of whom formerly operated as contract carriers under State authority. Many of these private carriers were and are jobbers and distributors of petroleum products. Protestants state that they did not oppose the formation of WECA only because assured by officials of the Office of Defense Transportation that the organization of WECA was purely a war measure, created to assist the Federal Government in the prosecution of the war, and that upon expiration of its temporary authority WECA would be dissolved. Protestants therefore contend, among other things, that the filing of the instant application was a breach of good faith. Whatever the reasons and circumstances which attended the organization of WECA and the subsequent filing of its application for temporary authority, they appear to be immaterial to the disposition of the instant application.

Prior to the war, a substantial part of the petroleum products consumed in the southeast moved by tank steamers through the ports of Savannah, Ga., Charleston, S. C., and Wilmington, N. C. During the war, movements through these ports ceased. In May 1942, transportation by tank car was restricted by the Office of Defense Transportation to distances of over 200 miles, except by special permit. During 1942, two pipe lines constructed for the purpose of carrying petroleum products into the south were placed in operation. Wartime pooling regulations, required the distribution of gasoline, kerosene, and heating oils, from terminals on these pipe lines nearest the destination regardless of terminal ownership.

The Southeastern Pipe Line Company extends in a northerly direction from St. Joe, Fla., through but not beyond, the State of Georgia to its terminus at Lookout Mountain, Ga., a point near Chattanooga, Tenn. It has eight outlets within Georgia. The Plantation Pipe Line Company extends from Baton Rouge, La., through Mississippi, Alabama, Georgia, South Carolina, North Carolina, and Virginia to Richmond, Va. The Plantation Pipe Line Company has

seven outlets [2] in Georgia, one in South Carolina, and three in North Carolina. At Plantation Pipe Line terminals petroleum products generally go into storage tanks such that the continuity of the movement is broken and movements from such outlets to points within the same state are in intrastate commerce. The Southeastern Pipe Line, however, is a party to proportional rates applicable on traffic moving from sources of supply to points in the southeast and traffic moving from Southeastern Pipe Line outlets in Georgia to points in the same State under those rates for the purposes of this case must be considered to be interstate commerce.

Applicant was incorporated in South Carolina on October 15, 1944. The majority of its stockholders are either oil jobbers or oil distributors in North Carolina, South Carolina, or Georgia. Its officers and directors are members of WECA. Its authorized capitalization is $50,000. Its balance sheet as of September 30, 1945, shows total assets of $80,344.68. Arrangements have been made to increase its capitalization to $250,000 through stock subscriptions payable in cash on demand. Applicant now owns 5 tank trucks, used for the transportation of petroleum products within South Carolina. It has an option to lease or purchase 143 tractor-trailers from the members of WECA, which can be exercised at any time within three years. If the application is granted applicant proposes to obtain sufficient capital to purchase 25 trucks. All stockholders of applicant owning stock or any other interest in other forms of transportation have agreed to divest themselves thereof.

Applicant is authorized by the South Carolina Public Service Commission to operate as a common carrier of petroleum products in bulk, from the pipe line outlets at Belton and Camp Croft, N. C., and from points in Charleston County, S. C., to points in South Carolina. Under arrangements with the North Carolina Public Service Commission it is permitted to transport the same commodities within North Carolina. It has filed an application with the Georgia

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[2] The terms "outlets" or "terminals" as used herein mean those points where facilities are maintained for receiving petroleum products and include those on the pipe lines and those at the ports, as the case may be.

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Public Service Commission for permanent authority to operate in that State in intrastate commerce. It proposes to operate from and to all points within the southeast and contends that the service which it contemplates can not be rendered by the existing motor carriers, either individually or collectively. The equipment, the average capacity of which is in the neighborhood of 4000 to 4300 gallons per tank truck, will be under the control and direction of applicant and will be operated from a central control office. Applicant proposes to locate equipment at points, which are convenient to the pipe line terminals, so that it can give the same service now being rendered to the public by WECA. It states that such disposition of equipment is required by reason of the location of the pipe line terminals and the fact that the volume of petroleum products moving from any particular pipe line terminal varies from day to day and that it would enable applicant to utilize to a greater degree the full carrying capacity of its equipment.

In the past, deliveries of petroleum products to the consumer or the service station have been made from the large bulk storage plants by small tank trucks. At present there is a definite trend in the industry to by-pass the bulk plants and transport petroleum products directly from terminals to consumer or retail outlet. A witness for one of the oil companies stated that 98 percent of its products now move directly to service stations. This method of distribution is economically sound as it eliminates excess handling and evaporation losses. The service stations with small storage tanks are being converted extensively to larger storage capacities ranging from 4 to 6 thousand gallons each, and capable of utilizing the full carrying capacity of the larger tank trucks now in use. As tending to show an increased need for motor transportation, applicant points out that most of the service stations and other users of petroleum products, due to unexpected demands for fuel, can not anticipate their needs sufficiently in advance to enable them to take scheduled deliveries. The capacity of the larger storage tanks being no more than equivalent to a truck load, service stations are unable to order additional supplies until their stocks are almost depleted, consequently they must have over-night or at least 24 hour delivery serv-

ice, or their supplies may be exhausted. Applicant contends that there will be an ever-increasing demand for the transportation of petroleum products by truck in the southeast. It points out that prior to the war, many establishments, homes, hotels, etc., were converting their heating plants from coal to fuel oil, and anticipates that such conversion, as soon as materials are available, will increase at an accelerated pace. Moreover, there is a decided tendency on the part of farmers to purchase mechanized equipment which uses gasoline or other petroleum fuels for power. They too, are purchasing storage facilities of sufficient size to accept a full truck load. Additional airports are being constructed or planned in the southeast. The airport at Spartanburg is an airplane evacuation center.

The pipe line pooling arrangements previously referred to have been discontinued and although the pipe lines are common carriers they will not accept shipments of petroleum products for movement to a particular outlet, unless the shipper has storage facilities there to take delivery. Many of the major oil companies have storage tanks at some of the pipe line outlets but none has storage facilities at all of the outlets. Thus gasoline marketed under a trade name, hereafter referred to as house-brand gasoline, will not be available at every outlet and in many instances will not be available at the nearest terminal. Not infrequently, the secondary source of supply will be at a point more distant than the nearest terminal. To illustrate one of the major oil companies has storage facilities at Albany, Ga., which serve as a primary source of supply. Its secondary source of supply is at Jacksonville, Fla., involving an additional haul of approximately 195 miles, despite the close proximity of the pipe line outlets at Coll and Foster. A witness for a major oil company estimated that approximately 20 percent of the gasoline his company marketed in the southeast, moves from secondary sources. The supply of gasoline at a given outlet or terminal is not constant. Many factors contribute to the scarcity of petroleum products at a particular outlet or terminal. Storms and other perils of the sea interrupt the movement of gasoline to the ocean terminals. Both flood conditions and low water in the rivers interrupt the movement of tankers to the river terminals,

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and pipe lines suffer from interruptions in service. Moreover, sudden and unpredictable fluctuations in demand due to weather, farming activity, price at a particular source and other circumstances, may deplete the supply at a given point making it necessary to draw from other sources. In other words, experience demonstrates that it is not possible to keep all sources of supply stocked at all times. Consequently trucks operating out of pipe line terminals today may be called upon to transport from water terminals tomorrow.

As illustrative of the service required an instance was cited where a particular consumer located at Spartanburg, who ordinarily secured his gasoline from the pipe line terminal at nearby Camp Croft, was required at different times to purchase his supply at Thrift, N. C., Chattahoochee, Ga., Charleston, and Savannah. At the time of the hearing, WECA was transporting shipments of petroleum products from Camp Croft to points in western North Carolina and from Thrift to a small area in South Carolina contiguous to Thrift. Shipments are being made from Chattahoochee to points in South Carolina and North Carolina; from Macon, Ga., to points in South Carolina; from Wilmington to a small area in South Carolina; and from Savannah to points in South Carolina. For the period from September 1, to October 15, 1945, WECA transported 39,753,500 gallons of petroleum products which moved from all pipe line outlets as well as from certain of the water terminals. A witness representing several large oil companies stated that his companies will move their products by water to Charleston, and thence distribute them by motor vehicle to all points in the southeast. This action is impelled by failure to secure storage facilities at the pipe line outlets. Exclusive of military requirements, these oil companies expect to sell or handle in excess of two million gallons of petroleum products a year in the southeast. The witness expressed the opinion that it will be necessary for them to purchase a large fleet of trucks to handle their business, in the event the service proposed by applicant is not available.

It is conceded by all, that the consumption of petroleum products during the war period which is not a record, was

abnormal. Applicant and protestants endeavored to estimate the future transportation requirements of the southeast by forecasting the consumption of petroleum products in 1946. Applicant estimated that the 1946 consumption of these products would equal that of 1941, and that there would be a gradual yearly increase thereafter. Protestants questioned that the 1946 consumption will exceed that of 1940, and anticipated no substantial increase in 1947. During the twelve month period ending September 30, 1940, the total consumption of petroleum products was 1,138,359 thousand gallons, whereas in 1941, the total movement was 1,433,027 thousand gallons. Shifts in population, increased agricultural and industrial activity, and other factors, some as a result of the war, others by reason of reconversion to peace time pursuits, have a direct bearing on the consumption of gasoline and other petroleum products. Although consumption is an index of the total transportation needs it can be considered in this proceeding only to the extent it reflects the interstate character of the movement. Prior to the war, a substantial movement of petroleum products into the southeast was through the ports and involved such storage thereat that the hauls therefrom to the consumer were principally in intrastate commerce. The advent of the pipe lines, the restriction of rail movements to the longer hauls, and the cessation of tanker movements materially affected the character of the movement during the war period. Since the cessation of hostilities, petroleum products have been moving and will move over all three modes of transportation. Consequently any forecast of the motor carrier requirements, necessary to move petroleum products in interstate commerce in the southeast must be considered in the light of changed conditions. Applicant states that for the period June 1, 1944, to May 31, 1945, WECA transported 357,495,100 gallons of petroleum products, approximately 50 to 55 percent of which moved in interstate commerce. In June, 1945, protestant, Beard-Laney, Inc. transported 1,465,908 gallons from the pipe line terminal at Thrift to points in the southeast, about 85 percent of which moved in interstate commerce. From the pipe line terminal at Camp Croft, the same protestant transported 420,593 gallons, approximately 65 percent of which

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moved in interstate commerce. This protestant estimates that about 35 percent of its entire movement during June, 1945 was in interstate commerce.

Protestants submitted in evidence, what purports to be a traffic study, for the purpose of showing that the presently certificated carriers can perform all the motor carrier service required in the southeast. The study assumes that the 1946 requirements will approximate those of 1940. Each movement of petroleum products in the southeast for 1940 was reallocated, on the assumption that in the future all traffic to a given destination would move from the nearest terminal. All consumption at the terminals was eliminated under the further assumption that no haul was involved. As between the pipe line terminals and the ports, the latter were selected if the hauls involved did not exceed a ratio of 55 to 45. The study and a formula which uses average vehicle capacity, average mileage and average trips per truck, produced the following results: (1) that the average length of haul in the southeast will be reduced from 185 miles in 1940 to 58 miles in 1946; (2) that the movement of the 1946 traffic will need about 26.9 percent of the service performed in 1940; and (3) that the 1946 movement will require about 168 tractor-trailers to perform that service. The probative value of this study is open to serious question, as it fails to take into account certain practical considerations existent in the transportation of petroleum products. As previously stated, the major oil companies do not have storage facilities at each pipe line outlet or water terminal and as a consequence shipments of house-brand gasolines do not move from the nearest pipe line terminal in every instance. The witness who prepared the study admitted that he was not familiar with the transportation conditions in the southeast and that the study did not reflect the actual movement of the traffic at the time of the hearing.

It is obvious that a shift from the pre-war origins to the pipe line terminals would result in a marked decrease in the average length of haul from what it was prior to the war period. This fact is supported by the experience of the motor carriers. Illustrative of the situation, is the pre-war movement of petroleum products from the port of Wil-

mington to Atlanta, Ga., a distance of 250 to 275 miles. During the war, the movement to Atlanta was from the nearby pipe line terminals at Chattahoochee and Doraville, Ga., with hauls of 8 to 15 miles, respectively. Although one intervener, stated that his average haul increased slightly, in the main, reductions were experienced by protestants, during the war period. One protestant stated that its average haul decreased from 204 miles in 1941 to 86 miles in 1945. Two others stated that their average hauls reflected for the same period, decreases from 223 to 61 miles and from 100 to 41 miles. The average haul of WECA during the war period was about 100 miles. Applicant points out however, that since the discontinuance of the pooling arrangements, a number of hauls have increased from 5 to 250 miles. However, the return to the use of tankers for the movement of petroleum products will have a marked influence on the area of distribution from the pipe line terminals. Based on the present rate structure, it was testified that the port terminals would serve an area roughly 150 miles inland from the Atlantic Coast and extending from Jacksonville, on the south to the North Carolina-Virginia line on the north.

Protestant, Petroleum Carrier Corporation of Jacksonville, has been authorized to operate as a contract carrier in the transportation of petroleum products from Augusta, Ga., to points in South Carolina without 150 miles of Augusta. Its permit was under temporary suspension until March 31, 1947. This protestant also, is authorized to operate within North Carolina and within South Carolina. It likewise holds authority to operate in intrastate commerce within Georgia and within Florida as a common carrier. Protestant's authority to operate as a contract carrier within Georgia is also under temporary suspension. It holds temporary authority to operate as a common carrier in interstate and foreign commerce from points on the Southeastern Pipe Line to destinations in the Carolinas and Georgia within 350 miles of the origin point. In *Petroleum Carrier Corporation Common Carrier Application*, M.C.C. , decided April 25, 1947, we authorized the issuance of a certificate of public convenience and necessity to protestants as a common carrier of petroleum products,

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in bulk, in tank trucks, from certain Florida points and from Savannah, Augusta, Bainbridge, Albany, Americus, Macon, Griffin, Atlanta, Rome and Lookout Mountain and points within 15 miles thereof to points in Georgia, Florida and South Carolina, within 175 miles of the origin point, upon condition that protestant request revocation of its outstanding contract carrier permits. In 1942, it transported 78,183,739 gallons of petroleum products from origins in Georgia, to numerous destinations in the southeast and to points in Florida and Alabama. For the first 7 months of 1945, it transported 46,926,207 gallons, substantially all of which moved from Chattahoochee, Coll, and Knox, Ga., and Jacksonville. In 1942, it operated 80 tractor-trailers and in 1945, 51 such units. At the time of the hearing, nine were idle. Loss of traffic was due in part to the resumption of rail shipments. This protestant is of the opinion that the use of truck transportation will decrease because the consumption at "high volume points" such as Atlanta and Macon will be transported by the privately operated trucks of the oil companies and in tank cars.

Protestant, Walker Hauling Company of Waycross, Ga., holds a certificate of public convenience and necessity authorizing it to transport as a common carrier of petroleum products, in bulk, in tank trucks, over irregular routes from terminals on the Southeastern Pipe Line, except Albany, to points in Georgia and Tennessee within 125 miles of the origin outlet and from Albany to points in Georgia and Tennessee within 115 miles of Albany. Within the southeast this protestant also holds temporary authority to transport petroleum products as a common carrier, from Port St. Joe and certain Southeastern Pipe Line Terminals to points within 300 miles of the origin terminal. In 1941, it owned 10 tractor-trailers, whereas in 1945, it owned 22 tractor-trailers and leased one. In 1941, it transported 11,884,296 gallons of gasoline and kerosene. In 1944, 60,553,491 gallons. In 1945 it lost a part of its business to the railroads, admittedly, because it could not meet rail competition. Protestant contends that there are sufficient transportation facilities in this territory to render all the service required.

Beard-Laney, Inc., of Camden, S. C., a protestant, holds

certificates of public convenience and necessity authorizing it to operate as a common carrier in the transportation of petroleum products, in bulk, to points in South Carolina, from Wilmington and points within 7 miles thereof, from Charlotte, and points within 15 miles thereof, and from the pipe line terminals of Chattahoochee and Knox. To points in North Carolina, this protestant is authorized to transport the same commodities from Spartanburg and points within 10 miles thereof, from Savannah and points within 7 miles thereof, and from the pipe line terminals above referred to. It is authorized also to transport petroleum products, in bulk, from those terminals to points in Georgia. In 1941, it owned 26 tractor-trailers and in 1945, 27 tractor-trailers with 18 others leased. It maintains truck-dispatching offices at Anderson, Spartanburg, Charlotte, and Charleston. In 1941, it transported 32,515,192 gallons of petroleum products and in June 1945, 5,619,993 gallons.

Intervener, William Carey Chaplin, doing business as W. E. Chaplin Transport, Swanson, S. C., has been issued a permit authorizing it as a contract carrier to transport petroleum products, in bulk, in tank trucks, over irregular routes, from Charlotte, and points within 10 miles thereof, to points in York, Chesterfield, Darlington, Florence, Marion, and Lee Counties, S. C. It also is authorized by the Public Service Commission of South Carolina to operate wholly within South Carolina. In 1941, this intervener owned 6 tractor-trailers and in 1945 5 such units. In 1941, he transported 14,253,966 gallons of petroleum products and in the first six months of 1945, 7,507,337 gallons.

Intervener, Vaughan's Transfer of Union, S. C., holds permits authorizing him as a contract carrier to transport petroleum products, in bulk, from Brunswick and Savannah and points within 10 miles thereof, to Columbia, S. C., and Spartanburg and to points within 2 miles thereof, over a regular route. In 1941, it owned 7 tractor-trailers and in 1945, 6 tractor-trailers. In 1941, it transported 3,456,163 gallons of petroleum products, whereas, in the first 6 months of 1945, it transported 5,546,337 gallons, part of which were transported under the authority of other carriers.

Intervener, Geo. A. Rheman Co., Inc., of North Charleston, S. C., has been issued a permit authorizing operation

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as a contract carrier of petroleum products, in bulk, in tank trucks, over irregular routes, (1) between Charleston and points within 10 miles thereof, on the one hand, and points in North Carolina and Georgia, on the other, (2) between Savannah and points within 10 miles thereof on the one hand, and, on the other, points in South Carolina, and (3) between Portsmouth, Va., and points within 10 miles thereof on the one hand and points in North Carolina, on the other. The portion of its operating authority between Portsmouth and North Carolina is under temporary suspension. It holds temporary authority to operate as a common carrier from outlets on the Southeastern Pipe Line to points in South Carolina and Georgia within 300 miles of the origin outlet. During the first nine months of 1940, it transported 12,926,400 gallons of petroleum products employing on the average 18.8 units, whereas, for the same period in 1945, using average of 6.3 units, it transported 13,299,660 gallons.

Intervener, Conway Transport of Conway, S. C., holds a certificate of public convenience and necessity authorizing it to operate as a common carrier of petroleum products, in bulk, in tank trucks, over irregular routes, from Wilmington and points within 15 miles thereof to Little River, Nixon's Cross Roads, Loris, Myrtle Beach, Conway, Georgetown, and Southern Kraft Pumping Station, S. C., and to points within 5 miles of each. The volume of business or the amount of equipment owned by this intervener is not of record.

Intervener, Petroleum Transportation Company, Incorporated, of Gastonia, N. C., holds a certificate of public convenience and necessity authorizing it to transport petroleum products, in bulk, in tank trucks, over irregular routes between Belton, and Spartanburg and points within 15 miles thereof, on the one hand, and on the other 24 counties in western North Carolina. The equipment and past operations of this intervener are not of record.

Interveners, War Brothers of Augusta, hold a certificate of public convenience and necessity from the Georgia Public Service Commission authorizing them to transport petroleum products, in bulk, between Macon and Augusta over Georgia State Highways 22, 16 and 12 serving all inter-

mediate points. They also hold temporary authority from the Georgia Public Service Commission to transport petroleum products, in bulk, between Brunswick and Augusta over state highways 25 and 21 and between Waynesboro and Milledgeville, Ga., over state highway 24. They are operating in interstate commerce under the second proviso of section 206 (a) of the act.

The southern rail carriers oppose the considered application. Of the total consumption of gasoline in 1941, the following percentages moved by rail, in North Carolina, 40.2 percent, in South Carolina, 41.2 percent, and in Georgia, 66.4 percent. These percentages include both interstate and intrastate movements. Since petroleum products are now being received at the port terminals, they anticipate that a substantial amount of the ex-boat traffic will again move by rail. They urge that any new motor carrier will drain off part of that traffic which in the past has been a source of considerable revenue to the rail carriers.

A representative of one of the major oil companies considers that the proposed services of applicant are not required in the southeast. His company owns approximately 27 units of equipment which it uses to transport its own products. Prior to the war, 50 percent of its traffic moved by rail but during the war period it was compelled to use the services of common carriers to secure the benefit of the proportional rates from outlets of the Southeastern Pipe Line. All short hauls are made in company-owned vehicles. However, it is the policy of this company, all things being equal, to comply with the routing instructions of their consignees.

Protestants contend that through either expressed or implied threats to withdraw supplies of petroleum products from the purchaser, applicant through its stockholders will be in a position to dominate and control the movement of traffic. For that and other reasons, protestants allege that the granting of the application would create unfair competition, in some instances eliminate competition, give applicant monopoly, and result in a direct rebate. They assert accordingly, that the granting of the authority requested would be inconsistent with the public interest and the national transportation policy. In view of these assertions we deem

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it necessary to consider the affiliations of applicant's stockholders with the petroleum industry.

There are 66 stockholders in the applicant corporation. Fifty-eight of them are jobbers, distributors, dealers, or so-called agents engaged in buying or selling petroleum products. Most of these distributors and jobbers deal directly with the major oil companies. A few are so-called independents who secure their supplies in the open market. They are located at widely scattered points in the territory here under consideration. Although no single stockholder handles a large volume of petroleum products, collectively they handle a substantial amount. The petroleum industry is highly competitive. In so far as the shipments bought and sold by the stockholders are concerned, they could control the routing. Because of their collective buying power, the stockholders would also be in a position to exert strong influence on the routing of all shipments made by the major oil companies in the southeast. Other common carriers in the affected area would be at a serious disadvantage in competing for the traffic. Opportunity for preferential treatment of the stockholders, who would be shippers, is also apparent. No carrier should be in a position where it can directly or indirectly exert influence on the movement of traffic. Such a situation does not "foster sound economic conditions in transportation and among the several carriers." All common carriers should compete for available traffic on an equal footing. Applicant disavows any intention of conducting the proposed operation in a manner other than in strict conformity with the act. Such disclaimer, although bona fide, is immaterial.

Upon the facts of record, we find that the granting of the application would be inconsistent with the public interest and the national transportation policy.

We also have for consideration the question of whether there is a permanent need for the services proposed by applicant. As stated, prior to the war petroleum products were transported into the southeast by the railroads and by tankers operating to the ports. During the war traffic over these modes of transportation were drastically curtailed, the movement being effected by tank trucks and the then-newly completed pipe lines. Heavy military requirements created

an unprecedented demand on all available motor vehicles. We granted temporary authority to numerous applicants, including WECA, as a result thereof. Since the cessation of hostilities, the situation has changed. The demands of the armed services have materially decreased. The railroads have resumed service and the tankers are transporting petroleum products to the ports. Moreover, except for an occasional movement, the length of haul has decreased. Several of the protestants are authorized to transport petroleum products from the southeastern ports and from those pipe line terminals from which petroleum products will normally move in interstate commerce. Some have idle equipment and if necessary have sufficient financial resources to secure additional equipment. The mere fact that applicant proposes to take over an operation which was instituted and conducted under temporary authority during an abnormal period is not conclusive proof that the service is required or that available traffic may not be conveniently and expeditiously handled by authorized carriers now operating in the affected territory. Although many of the witnesses indicated a preference for applicant's service, mere desire for such service over that of existing authorized carriers is insufficient to warrant a finding that public convenience and necessity require applicant's service. Moreover, we have found repeatedly that existing motor carriers should normally have the right to transport all traffic they can handle adequately, efficiently and economically in the territories they serve. The burden of proof is upon applicant to show affirmatively that the proposed operation would serve a useful purpose responsive to a public demand or need, and that the public need can not or will not be met as well by the existing carriers. In our opinion, applicant has failed to meet this burden.

We also find that applicant has failed to establish that the proposed operation is or will be required by the public convenience and necessity, and that the application should be denied.

An appropriate order will be entered.

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ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 30th day of June, A. D. 1947.

No. MC-106119

ASSOCIATED PETROLEUM CARRIERS COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said division on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That the said application, be, and it is hereby, denied.

By the Commission, division 5.

(SEAL.)

W. P. BARTEL
Secretary.

EXHIBIT "E"

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-106119

Associated Petroleum Carriers Common Carrier Application

Decided February 19, 1948

On reconsideration, findings in prior report, M.C.C., reversed, and public convenience and necessity found to require operation by applicant as a common carrier by

motor vehicle of petroleum products, in bulk, in tank trucks, over irregular routes, from specified points in Georgia, North Carolina, and South Carolina to all points in those States. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Appearance as shown in prior report, and in addition, *C. D. Todd, Jr.*, for intervener.

Report of the Commission on Reconsideration

Division 5, Commissioners Lee, Rogers, and Patterson

By Division 5:

In the prior report, M.C.C., decided June 30, 1947, public convenience and necessity was found not to require operation by applicant, Associated Petroleum Carriers, a corporation, of Spartanburg, S. C., as a common carrier by motor vehicle of petroleum products, in bulk, in tank trucks, in interstate or foreign commerce, between points in Georgia, North Carolina, and South Carolina, and it was further found that such operations, by reason of applicant's affiliation with the petroleum industry would be inconsistent with the public interest and the national transportation policy. On December 24, 1947, upon further consideration of the record in this proceeding and upon consideration of applicant's petition for reconsideration and oral argument and replies by certain motor carrier protestants, namely, Beard-Laney, Inc., Chaplin Transport, Conway Transport, Vaughan's Transfer, and Walker Hauling Company, the proceeding was reopened for reconsideration on the present record and the petition in all other respects was denied.

The facts stated in our prior report are not disputed and that report is referred to and made a part hereof. The facts will be repeated in this report only to the extent necessary for a clear understanding of our discussion. Applicant seeks a certificate of public convenience and necessity authorizing the transportation of petroleum products, in bulk, in tank trucks, between all points in Georgia, North Carolina, and South Carolina. In so operating it expects to

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fulfill a need for service which is now supplied in this territory by War Emergency Cooperative Association, hereinafter called WECA, which will then cease all operations as a carrier in interstate or foreign commerce.

WECA was organized in 1942 under the sponsorship of the Office of Defense Transportation. It was then, and is now, an association of former private carriers domiciled in Georgia, North Carolina, and South Carolina, some of whom formerly operated under State authority as contract carriers. Many of these private and contract carriers were and are jobbers or distributors of petroleum products. During the war, the railroads were not permitted, with few exceptions, to use tank cars for hauls of less than 200 miles. One of the important purposes of WECA was to make full utilization, in the performance of transportation for the public generally, of tank trucks belonging to numerous owners. This was considered necessary because of the shortage of motor transportation equipment and the additional burden thrown upon motor carriers by the withdrawal of short-haul rail service.

Applicant was incorporated in South Carolina on October 15, 1944. Its officers and directors are members of WECA. There are 66 stockholders, 58 of whom are jobbers, dealers, or so-called agents engaged in buying and selling petroleum products in Georgia, South Carolina, and North Carolina. All stockholders of applicant owning stock or any interest in other forms of transportation have agreed to divest themselves thereof. Applicant owns 5 tank trucks which are used in intrastate transportation of petroleum products, and it has options to buy or lease 143 tractor-trailers of about 4,000 to 4,300-gallons capacity. This equipment will be under the absolute control and direction of applicant and will be operated from a central control office at Spartanburg. It is proposed to station the equipment at various points throughout the three States involved convenient to various petroleum terminals so that it will be available according to the fluctuating volume of petroleum products moving from any particular pipe-line terminal or other source of supply on any particular day.

The instant application was filed August 23, 1945 and

was duly heard by a joint board at Spartanburg on October 30 and 31, and November 1, and 2, 1945, and at Atlanta, Ga., on November 5, 6, and 7, 1945. Fourteen motor carriers and the railroads operating between various points in Georgia, North Carolina, and South Carolina opposed the application. Subsequent to the issuance of the joint board's report and recommended order, which was served on April 8, 1946, and which proposed to grant the operating authority sought except as to operations between points wholly within a single State, the Contract Carrier Conference of the American Trucking Associations, Inc., sought and was granted permission to intervene. It, as well as other interveners and protestants, herein referred to collectively as protestants, opposes the granting of operating authority to applicant because its principal stockholders are primarily engaged in the distribution and sale of petroleum products, and applicant, if granted a certificate, would transport commodities dealt in by its stockholders. This, it is alleged, would establish a precedent detrimental to the interests of for-hire carriers in that it would outline a pattern which might be followed in the future by any group of shippers for the transportation of their own traffic.

The record in this proceeding contains considerable evidence relating to operations conducted under temporary authority by WECA since 1942 in the transportation of petroleum products, in bulk, in tank trucks, between points in North Carolina, South Carolina, Georgia, and Florida. Protestants argue strenuously that WECA was organized only as a temporary expedient to assist the Federal Government in the prosecution of the war and that any need for its service, if there ever was an actual need, was the result of an emergency war condition which does not now exist. We are not inclined to view WECA's operation during the war, standing alone, as proof that public convenience and necessity require continuance of such service by applicant. Changes in sources of supply which occurred during the war, however, will continue in effect during the postwar period which, as well as other facts, we must consider in determining whether or not a need exists for all or any part

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of the service proposed by appliant which is not, or cannot adequately be, performed by existing carrier services.

As stated in our prior report, before the war a substantial part of the petroleum products consumed in Georgia, North Carolina, and South Carolina moved by tank vessels to the ports of Savannah, Ga., Charleston, S. C., and Wilmington, N. C., from which they were carried inland by railroads, trucks, and barges. In May 1942 transportation by railroad tank cars was generally restricted to distances in excess of 200 miles. During the same year two pipe lines, which were constructed to serve the southeast, were placed in operation. One of these pipe lines, operated by the Southeastern Pipe Line Company, extends from Port St. Joe, Fla., to Lookout Mountain, Ga., a point near Chattanooga, Tenn., and has outlets or terminals in Georgia at Coll near Bainbridge, Albany, Foster near Americus, Knox near Macon, Linco near Griffin, Chattahoochee near Atlanta, Berwin near Rome, and Lookout Mountain. The other pipe line, operated by the Plantation Pipe Line Company, extends from Baton Rouge, La., to Richmond, Va., and has outlets or terminals in Georgia at Bremen, Meyer near Columbus, Rurland near Macon, Doraville near Atlanta, and Oconee Heights near Athens; in North Carolina at Thrift near Charlotte, Salisbury, and Friendship near Greensboro; and in South Carolina at Belton near Anderson and Camp Croft near Spartanburg.

While comparatively small gallonages continued to move from the coast ports of Savannah, Wilmington, and Charleston during 1942 and 1943, during the year ended May 31, 1945, WECA transported 77,795,600 gallons from Savannah, 65,876,000 gallons from Wilmington, and 23,727,400 gallons from Charleston. During the earliest period extending from July 1, 1942, through December 31, 1943, it transported 13,901,900 gallons from Savannah, 4,042,000 gallons from Charleston, and 8,385,000 gallons from Wilmington. Resumption of service from Fayetteville, N. C., which source is supplied by barges operating on the inland waterways, and Brunswick, Ga., an Atlantic Coast port, is also shown.

Wartime pooling regulations required the distribution of gasoline, kerosene, and heating oils from terminals on the

pipe lines nearest the destination regardless of terminal ownership. The pooling arrangements have been discontinued, and, although the pipe lines are common carriers, they will not accept shipments of petroleum products for movement to a particular outlet unless the shipper has storage facilities there to take delivery. Many of the larger oil companies have storage tanks at some of the pipe-line outlets, but none has storage facilities at all of the outlets. Thus gasoline marketed under a trade name, sometimes known as house-brand gasoline, will not be available at every outlet, and, in many instances, will not be available at the nearest outlet. Not infrequently the usual primary source of supply for house-brand gasoline will be out of stock and it will be necessary to go greater distances to obtain supplies from secondary sources. The unavailability of supplies at primary sources may be caused by storms or other perils of the sea, interrupted movements to ocean terminals, and either flood or low water conditions on the rivers which delay the movements of tankers to river terminals. Prices and interruptions in service on pipe lines also make it necessary at times for receivers to seek secondary sources of supply.

In its petition applicant contends that the record clearly shows a need by the shipping public for its proposed service and that existing facilities of carriers having permanent authority to operate within certain portions of the territory involved are not sufficient to fulfill that need. Applicant refers specifically to a number of terminals and areas between protestants, either individually or collectively, do not hold permanent authority to operate. Protestants in their reply, however, insist that existing services are entirely adequate. The record shows that a number of large shippers of petroleum products have need for transportation by truck from all of the pipe line terminals or outlets and ocean terminals hereinbefore mentioned as well as Moorehead City and New Bern, N. C., to numerous points located generally throughout Georgia, North Carolina, and South Carolina. One of these shippers has terminal storage facilities at all of the outlets on the Southeastern pipe line in Georgia and has arrangements with consignees at eight outlets of the

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Plantation pipe line, including Belton, Camp Croft, Thrift, Salisbury, and Friendship to terminal for its account, about 6,000 barrels a day. These terminaling arrangements were made under the war emergency but have since been continued. It also ships from the ocean terminals. The witness for this shipper, who had been with its traffic department for about 26 years, estimated that the pipe lines would lose tonnage in an area within 100 miles of the Gulf of Mexico coast and within 150 miles of the Atlantic coast from Jacksonville to the North Carolina-Virginia State line. Another large shipper has storage capacity for about 22,000,000 gallons at Savannah where it unloads ocean-going tankers. Its monthly volume is about 5½ million gallons in the three States, of which about 2½ million is distributed in Georgia and about 1 million gallons are transported by railroad. This shipper expects to enlarge its coverage in North Carolina and South Carolina, and, because of increased mechanized farming and oil-heating of tobacco barns, it also expects an increase in its farm market. A group of affiliated oil companies has storage capacity for almost 5,000,000 gallons at Charleston. They also ship from Savannah and Wilmington but distribute most of their products from Charleston because the depth of channel there is sufficient to accommodate the large tankers and it is a central distributing point for the three States involved. While we stated in our prior report that these companies expect to distribute 2,000,000 gallons per year, that was an error and the volume should have been stated as 2,000,000 gallons per month. The representative of these shippers stated that they sell in practically every town in North Carolina and South Carolina and use trucks exclusively for transportation. As stated in our prior report, operators of bulk plants, gasoline filling stations, bus-line operators, and other large consumers of petroleum products located generally throughout the area involved also support the application.

It is well settled, as stated by protestants, that public convenience and necessity do not require a new service when existing carrier services are satisfactory and adequate, and that the preference of a shipper for the services

of a particular common carrier is not sufficient to establish a need for that carrier's service. At least one witness in this proceeding complained of protestants' service on the ground that the carriers were either busy or under contract with someone else. We have said many times that a shipper is entitled to a dependable motor carrier service which is not subject to the contingency of negotiating a satisfactory agreement for contract carriage or the burden or assuming the obligation of such relation. While railroad service is available between many of the points here involved, few of the receivers of petroleum products which support this application have storage facilities of sufficient size to accommodate carload shipments. The operating authority of protesting carriers are outlined in detail in our prior report. It will be noted that only five hold certificates authorizing operations within a part of the territory involved. Of these, Conway Transport is authorized to transport petroleum products, in tank trucks, from Wilmington and points within 15 miles to seven destinations in South Carolina and points within 5 miles of each. There is no information of record, however, to indicate the volume of business, amount of equipment operated, or that it can perform any additional service. Petroleum Transportation Company, Incorporated, holds a certificate authorizing it to transport petroleum products, in tank trucks, between Belton and Spartanburg and points within 15 miles thereof, on the one hand, and, on the other, points in 24 counties in western North Carolina. There is likewise no information of record as to this carrier's past operation, equipment, or ability to perform additional service. Warr Brothers are authorized to transport petroleum products, in bulk, as a common carrier between Macon and Augusta, serving all intermediate points, between Brunswick and Augusta, and between Waynesboro and Milledgeville, Ga., over regular routes, but there is no information that they can perform additional service.

Walker Hauling Company is authorized to operate as a common carrier of petroleum products, in tank trucks, from terminals on the Southeastern pipe line, except Albany, to points in Georgia within 125 miles of the origin outlet, and from Albany to points in Georgia within 115 miles of

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Albany. Beard-Laney, Inc., is authorized to operate as a common carrier of petroleum products from Wilmington and points within 7 miles thereof, Charlotte and points within 15 miles thereof, and pipe line terminals at Chattahoochee and Knox to points in South Carolina; from Spartanburg and points within 10 miles thereof, Savannah and points within 7 miles thereof, and pipe-line terminals at Chattahoochee and Knox to points in North Carolina; and from Chattahoochee and Knox to points in Georgia. Public convenience and necessity has been found to require operation by Petroleum Carrier Corporation as a common carrier of petroleum products, in tank trucks, from Savannah, Augusta, Bainbridge, Albany, Americus, Macon, Griffin, Atlanta, Rome, and Lookout Mountain and points within 15 miles thereof to points in Georgia and South Carolina within 175 miles of origin, and issuance of a certificate has been authorized upon compliance with certain conditions. A certificate authorizing such operations has not yet been issued. Petroleum Carrier Corporation is operating in the Carolinas and Georgia under temporary authority, and it is also authorized to operate as a contract carrier between certain points in those States. These three carriers operate a total of about 128 tractor-trailer tank trucks, including 19 which are leased from others. At the time of the hearing they were not operating at full capacity and representatives of each of the carriers stated they were able and willing to add to their equipment if demands for services indicated a need for doing so.

In its petition applicant points out that the record fails to show any existing permanent common carrier authority to operate from many of the sources of supply to the destination territory here involved. A reexamination of the facts in this case shows this to be true. It will be noted from the foregoing that neither of the carriers showing a capacity for handling additional traffic is authorized to operate from Charleston, Moorehead City, New Bern, Brunswick, or any of the pipe-line terminals on the Plantation pipe line except one is authorized to serve Thrift and Camp Croft, and from these latter points its service is limited to destinations in North Carolina from Camp Croft and to destinations in

South Carolina from Thrift. The other carrier's permanently authorized interstate operations are entirely within Georgia, and its operations there are limited to points within 125 and 115 miles of origin.

It is conceded by all that the consumption of petroleum products during the war was abnormal. It is open to conjecture whether postwar transportation requirements will equal or exceed those of 1940. Many witnesses in support of the application express the belief that there will be a continued increase in consumption of petroleum products by reason of conversion of heating plants in homes, hotels, and commercial establishments from coal to fuel oil, mechanization of farming equipment, increased use of fuel oil in tobacco barns and growth of the aviation industry. Protestants attempt to show that any additional traffic load that may result from increased use of petroleum products, which increase they do not concede to be a fact, can easily be handled with less transportation equipment than was necessary in 1940 due to the advent of the pipe lines, which has materially shortened the average length of haul, and increased carrying capacity of tank trucks and trailers which are now generally in use. They furnished a traffic study which, for the reasons stated in our prior report is subject to serious question, in which they reach the conclusion that the 1946 volume of movement would require about 168 tractor-trailers.

While protestants have shown that they are in a position to handle additional tonnage, it should be noted that the combined total of the equipment operated by them approximated that operated by WECA at the time of the hearing. During a six-week period immediately preceding the hearing WECA transported 39,753,500 gallons or approximately 9,900 truckloads from pipe-line outlets, ocean terminals, and Fayetteville. No common carrier service is shown to be available to serve the entire territory in which a definite need for service is established by shipper witnesses, nor is it shown that existing carriers can absorb the substantial tonnage transported by WECA in the territory involved. While the representative of one shipper stated that a need existed for service between its bulk plants lo-

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cated at various points in the three States, no such transportation is shown ever to have been performed by WECA nor is any definite reference made to any particular time when such service was required by the shipper. We conclude that we erred in finding in our prior report that public convenience and necessity did not require the proposed service to the extent of operation from coast terminals, pipe-line outlets, and Fayetteville, N. C., to points in the territory covered by the application.

In our prior report we also found that the proposed operation, by reason of applicant's affiliation with the petroleum industry, would be inconsistent with the public interest and the national transportation policy. We adhere generally to the principles enunciated therein, but, in view of the public need for at least a part of the proposed service which has been shown, it becomes necessary to weigh again the objections to the granting of authority to applicant against the advantages accruing to the shippers and consumers through applicant's furnishing of a needed transportation service.

Protestants contend that applicant will engage in unfair competition with existing for-hire carriers of similar commodities and that the plan of operation involves an indirect rebate, violates applicable Federal Laws, tends to create a monopoly, lessens competition, is in restraint of trade, and that any person desiring to engage in the transportation of similar commodities in the southeast need not apply for a certificate but need only approach applicant and make a satisfactory deal without consulting this Commission. It does not appear that the present competitive relation, as it now exists between WECA and protestants, would be materially changed by applicant entering the field in place of WECA. There has been no showing that any common carrier has suffered any substantial loss of revenue or that its service has been impaired by reason of the present competitive situation. Generally speaking, there is no claim by anyone that a new service is now needed, but the record is replete with evidence that WECA has been supplying a service upon which the shipping public relies and that this service cannot be withdrawn, through denial of this appli-

cation, without detriment to the shipping public. We have carefully considered each of the arguments outlined above, but find no evidence to show that applicant will be in fact, or that WECA has been, in violation of any provision of the Interstate Commerce Act or other Federal statutes or any of our rules and regulations as alleged.

We are inclined to minimize the danger to which protestants point in establishing a precedent under which enterprising promoters might organize corporations and sell stock to persons who control traffic in other commodities such as textiles, beverages, mercantile goods, drugs, food products, and numerous other commodities. The situation in which shippers control or dominate a carrier is not novel. While it appears that other carriers may be at some competitive disadvantage, we are inclined to place more emphasis upon the supplying of an essential service than upon the possibility of injury to competing carriers. Applicant, of course, will be expected to comply strictly with the requirements of the act and our rules and regulations thereunder, and in the event of any unlawful action on its part appropriate remedies are available to aggrieved parties.

Upon reconsideration, we find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of petroleum products, in bulk, in tank trucks, over irregular routes, from Wilmington, Fayetteville, Moorehead City, and New Bern, N. C., Charleston, S. C., Savannah, Ga., and terminals in Georgia, North Carolina, and South Carolina on the pipe lines of the Southeastern Pipe Line Company and the Plantation Pipe Line Company to all points in Georgia, North Carolina and South Carolina; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and of our rules and regulations thereunder; that a certificate authorizing such operation should be granted, and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and of our rules and regulations thereunder, an appropriate certificate will be issued.

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An order will be entered denying the application except to the extent granted herein.

Commissioner Patterson dissents.

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D .C, on the 19th day of February, A. D., 1948.

No. MC-106119

Associated Petroleum Carriers Common Carriers Application

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

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JUN 22 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

Docket No. ~~884~~ 137

BEARD-LANEY, INC., PLAINTIFF-APPELLANT,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ASSOCIATED PETROLEUM CARRIERS, DEFENDANTS-APPELLEES.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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Supreme Court of the United States

Docket No. ----

BEARD-LANEY, INC., PLAINTIFF-APPELLANT,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ASSOCIATED PETROLEUM CARRIERS, DEFENDANTS-APPELLEES.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

STATEMENT

The application involved in the case at bar stems from and supersedes the operations conducted by the War Emergency Cooperative Association, hereinafter called WECA.

WECA was organized in June, 1942, at the instance of the Office of Defense Transportation and under its sponsorship. It was granted temporary authority as a common carrier to transport petroleum products in bulk, in tank trucks, between all points in North Carolina, South Carolina, Georgia and Florida. That authority is still effective. The members of this Association are the same as the

stockholders of Applicant, who were former private carriers and jobbers and distributors of petroleum products.

During 1942 the Southeastern Pipe Line Company opened a pipe line extending from Port St. Joe, Florida, through Georgia, to Lookout Mountain, Tennessee. This Pipe Line Company published what is called proportional rates. The Plantation Pipe Line was also opened during the year 1942, and it operated through Georgia, South Carolina and North Carolina. This Pipe Line did not publish proportional rates. Private carriers were unable to participate in proportional rates.

At this same time the Office of Defense Transportation had issued an order prohibiting the use of railway tank cars for hauls of two hundred miles or less. Thus it became necessary that the tremendous war-generated burden of this traffic be borne by the motor carriers who, incidentally, were unable to obtain additional equipment or even to maintain adequately what was then in operation. The only apparent solution to the problem was to put existing private carrier equipment to its maximum use; so, WECA, the legitimate sire of the present illegitimate offspring, came into being.

By the instant application it proposes to obtain permanent authority, and Division 5 of the Interstate Commerce Commission, on a record made in October and November, 1945, at the most favorable time for Applicant, first unanimously denied the application, but on reconsideration on that very same record has reversed itself by a two-to-one vote, with Commissioner Patterson dissenting.

When WECA was proposed the existing for-hire carriers opposed it because of their fear of precisely what has happened; but in response to the representations of the Office of Defense Transportation that WECA would be

temporary only, and because of their patriotic desire to support their Government in every conceivable way in its prosecution of the War, they withdrew their opposition and even themselves became members. This patriotism is now being repaid in cruel coin, and through a mere change of name WECA is to be perpetuated.

Appellant, together with other protestants, filed a petition with the Commission for further consideration. This petition was denied by order of the Commission dated October 8, 1948. Appellant then instituted a suit to set aside said order of the Commission. The Court below delivered a written Opinion, filed Findings of Fact and Conclusions of Law and a Decree denying the injunction and other relief prayed for and dismissed the suit.

I. THE ULTIMATE FINDING OF THE COMMISSION THAT PPRESENT AND FUTURE PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE GRANTING OF THE CERTIFICATE IN QUESTION MUST, UNDER THE LAW, BE SUPPORTED BY BASIC FACTUAL FINDINGS, WHICH IN TURN MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Appellees contend that a second judicial scrutiny of the evidence to determine its inadequacy to support the Commission's order would be a burdensome exercise of appellate review not required in the interest of orderly and efficient administration of justice. This contention is wholly lacking in merit. The administrative procedure act (U. S. C. A., 1009 (e)) scope of review, is applicable to the case at bar, and in particular the following provisions thereof:

> "So far as necessary to decision and where presented, the reviewing Court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability

of the terms of any agency action. It shall * * *; and (B) hold unlawful, to set aside agency action findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; * * * (5) unsupported by substantial evidence in any case subject to the requirements of Secs. 1006 and 1007 of this Title or otherwise reviewed in the record of any agency provided by statute; * * * and in making the foregoing determinations the Court shall review the whole record, or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

(1) Commission's Findings are Unsupported by Substantial Evidence.

The opinion of the Court below states:

"The portions of the last report which we have quoted above are certainly sufficient when taken in connection with the detailed findings of statutory facts preceding them, as findings that the service which Appellant proposes to render is needed by the public, that it cannot be furnished by other carriers operating within the territory and that it will not result in destructive competition hurtful to the public interest; * * * and there can be no question that the evidence before the Commission amply supports this finding. Witness after witness testified as to the need for the service; documentary evidence shows that the operating authority of the protesting carriers is so limited that they cannot service the territory allotted to Applicant; and the fact that WECA is now handling such a large portion of the traffic is sufficient basis for the finding that the substitution of Applicant in its place will not result in competition hurtful to the public interest."

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We submit that a review of the evidence will show that the conclusion of the Commission of a need for the service, and approved by the Court below, is not supported by any substantial evidence.

In reviewing administrative findings the Court must always determine whether the findings are supported by substantial evidence. It is no longer sufficient, as has been true in some instances, that the findings be supported by some evidence.

United States v. Watkins, 73 Fed. Supp., 216, 219.

The testimony of the "public interest" witnesses **as to the need for the service,** with one exception, showed that the services rendered by the for-hire carriers prior to the War were satisfactory and adequate (R. 216, 266, 275, 291-302, 333-5, 385-6, 406-7, 425-6, 457-8, 522-3, 577 et seq., 614, 627-9, 671, 895) and nowhere is it disputed by the Commission in its second report.

In its second report the Commission found (Sheet 5) that

> "at least **one witness** in the proceeding complained of protestant's service on the ground that the carriers were either busy or under contract with someone else and **not because of limited operating authority**" (Emphasis added).

The documentary evidence (Exhibit 7) shows gallons hauled and names of shippers for six weeks' period just prior to the hearing. Approximately 67% of the gallonage shown was hauled for shippers such as the Army Air Forces, The Texas Company, Gulf Oil Corporation, Sinclair Refining Company, Shell Oil Company and Standard Oil Company of New Jersey, who were conspicuous by their failure **to testify and support the need for applicant's service.**

Furthermore, Exhibit 8 shows the terminals at which this gallonage originates, and

> "between 50 and 55% of that moving in interstate commerce" (R. 108-9);

but nowhere is there any evidence of this gallonage moving from the origin points shown thereon to all points and places in the States of North Carolina, South Carolina and Georgia. Neither is there any evidence of any traffic originating at Morehead City and New Berne, N. C. which the Commission authorized to be served.

And the Commission in its first report (Sheet 5) found[1] that

> "At the time of the hearing WECA was transporting shipments of petroleum products from Camp Croft to points in western North Carolina, and from Thrift to a small area in South Carolina contiguous to Thrift. Shipments are being made from Chattahoochie to points in South Carolina and North Carolina; from Macon, Ga. to points in South Carolina; from Wilmington to a small area in South Carolina; and from Savannah to points in South Carolina."

Exhibits 42, 43, 44 and 45 show operating authority of appellant. It has the authority to render the service being performed by WECA at the time of the hearing.

Exhibits 33, W. C. Chaplin Transport; 37 and 38, Vaughan's Transfer; 52, The George A. Rheman Co., Inc.; 57, Walter Hauling Co.; 67, Petroleum Transportation, Inc.; testimony of the witness Grass (R 999) for Petroleum Carrier Corporation, shows that the operating authority of these carriers collectively to be sufficient to transport the movement of the traffic handled by WECA as aforesaid,

[1] The Commission in its second report (Sheet 1) stated: "The facts stated in our prior report are not disputed, and that report is referred to and made a part hereof."

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as well as to handle such traffic "as will normally move in interstate commerce (Sheet 11, first report)."

It thus appears that the statutory Court apparently overlooked this evidence, and failed to determine whether or not the findings are supported by substantial evidence.

> "Substantial evidence is evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference or fact which is sought to be sustained. It implies the quality of proof which induces conviction and which makes a definite impression on reason. It must be more than a scintilla of evidence and more than a suspicion or surmise. It must be more satisfying than hearsay or rumor. Mere rags and tatters of evidence are not sufficient. Some Courts have gone so far as to say that evidence subject to one or two inferences is not substantial. The test in determining what constitutes substantial evidence in an administrative proceeding is the same as that applied in trials by jury." *United States v. Watkins, supra.*

(2) The Commission Exceeded its Statutory Authority in Granting the Application.

The Commission failed to apply the statutory standards for making the subordinate basic findings of public convenience and necessity. We submit that the Court below in its opinion clearly shows this to be true when it stated:

> "The portion of the last report which we have quoted above is certainly sufficient, when taken in connection with the detailed findings of evidentiary facts preceding them, as findings that the service which the Applicant proposes to render is needed by the public; that it cannot be furnished by other carriers operating within the territory; and that it will not result in destructive competition hurtful to the public interest. We may not ignore these facts because made in the

form of a narrative order rather than in separately numbered paragraphs."

Here we have the Court supplying the necessary basic subordinate findings which the Commission failed to do by spelling out, arguing and choosing between conflicting inferences in the Commission's discussion of the evidence.

The findings by the Commission must be specific and definite, at least sufficiently simple and clear so as not to leave to the Court the burden of being compelled to spell out, to argue and to choose between conflicting inferences.

Inland Motor Freight v. U. S., 60 Fed. Supp., 520;
Fine & Jackson Trucking Corp. v. U. S., 65 Fed. Supp., 443;
Hudson Transit Lines, Inc., v. U. S., 82 Fed. Supp., 153;
State of Florida v. U. S., 282 U. S., 194, 214;
U. S. v. Carolina Freight Carriers Corp., 315 U. S., 475.

The Court below relied on the case of *I. C. C. v. Parker*, 326 U. S., 60, 69, where the contention was made that there was no basis for issuing a certificate to a railroad to operate a motor line, since no evidence was offered as to the inadequacy of the motor carriers then holding certificates to serve the railroad's need.

We submit that the *Parker case, supra* is not controlling on this question, as will appear from the language of the Court in disposing of the above contention, when it was said:

"Consequently, the issuance of the certificate is subject to all the requirements of any other application for a certificate for operation of motor lines. Since, however, on adequate evidence the Commission found that the motor service sought was of a different char-

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acter from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers, 42 M.C.C. 725, 726, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue."

In the case at bar the evidence shows that the character of the service to be porformed by Applicant is the same as that performed by Appellant and other existing carriers. The Commission in its second report also admits that Appellant and other existing carriers "may be at some competitive disadvantage." (Sheet 7.)

(3) Commission's Findings Arbitrary, Capricious and Abuse of Discretion.

We submit that a review of the Commission's second report and the evidence will show that the Commission refused to make essential findings as to:

> "Whether the new service will serve a useful purpose responsive to a public demand or need;
>
> "Whether this purpose can and will be served as well by existing carriers; and
>
> "Whether it can be served by Applicant in a new operation or service without endangering or impairing the operations of existing carriers, contrary to the public interest;"

as required by decisions of the Commission, and that same are not supported by substantial evidence.

> *Pan American Bus Line Operations,* 1 M. C. C., 199, 203;
>
> *Blue Nose Bus Company, Ltd.,* 1 M. C. C., 173, 176;
>
> *Craig Trucking Co. Application,* 46 M. C. C., 433.

The substantial evidence indicates that there is an abundance of motor carriers transporting petroleum prod-

ucts in bulk in tank trucks with sufficient equipment, resources and operating authority to collectively provide all the service from the terminals to the territory which petroleum products will normally move in interstate commerce. (Sheet 11 prior report.)

The Commission also concluded (Sheet 12 prior report) that:

> "Although many of the witnesses indicated a preference for Applicant's service, mere desire for such service over that of existing authorized carriers is insufficient to warrant a finding that public convenience and necessity require Applicant's service."

The Commission in a recent decision (Squaw Transit Company, Common Carrier Application, decided March 1, 1948, 48 M. C. C., 17, 22) stated:

> "We have consistently adhered to the view that existing carriers are entitled to handle any available traffic which they can handle economically and efficiently, and that the operation of existing economic conditions in the motor carrier industry would be jeopardized by allowing new operations to enter a field in competition with existing carriers who are furnishing adequate and efficient service."

The only substantial evidence in the record in favor of Applicant is that during the abnormal period brought about because of the War, a large volume of petroleum products was hauled by trucks operating under its temporary authority. The Commission's policy, as expressed in *Miller, Extension of Operations-Vernon-Memphis,* Tex., 27 M. C. C., 731, is that evidence of wartime conditions is not acceptable as proof of public convenience and necessity under normal peacetime conditions.

Furthermore, the Commission states in its second report (Sheet 7):

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• • • "While it appears that other carriers may be at some competitive disadvantage • • •"

clearly an admission that the granting of the Application will endanger and impair the operation of existing carriers.

The Commission has heretofore refused to grant certificates to common carriers found to be dominated by shippers.

D. L. Wartena, Inc., of Illinois Extension, Tex. Docket MC 69842 (not reported).

The Commission refused to apply the evidence in the case at bar to its policy as expressed in the above decisions, and the Court below, in disposing of these issues, stated:

> • • • "Protestants were not authorized to render service throughout the territory; and quite apart from this there is nothing in law or in reason which requires that the Commission permit those already in the field to absorb the business which would be relinquished • • •."

Neither the report of the Commission nor the decision of the Court below has pointed out any fair or substantial cause, nor given any substantial reason for departing from the express policy and decisions of the Commission as above set out; and the granting of this Application without proper consideration of the evidence, or to make an essential finding as to whether existing carriers are unable or unwilling to meet any reasonable demand that may be made upon them; in changing its policy and granting a certificate based only on evidence of abnormal conditions, and to a carrier dominated by shippers, without any substantial reasons for doing so, is arbitrary action.

Baltimore and Ohio Railroad Co. v. U. S., 264 U. S., 258.

II. THE FAILURE OF THE COURT BELOW TO FIND THAT THE GRANTING OF THE APPLICATION WOULD BE INCONSISTENT WITH THE NATIONAL TRANSPORTATION POLICY AND IN VIOLATION OF THE FEDERAL ANTI-TRUST LAWS IS PATENT ERROR.

The Commission is trusted by Congress to guard against the danger of the development of a transportation monopoly.

> 15 U. S. C. A., 1-7, 15 note;
> *I. C. C. v. Parker*, 326 U. S., 60.

To prevent the creation of a transportation monopoly Congress placed in the Commission power to control such developments. The National Transportation Policy (49 U. S. C. A., preceding Sec. 1) requires the Commission to

> "promote * * * economic * * * service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service without unjust discrimination, undue preference or advantage * * *."

The preservation of independent and competing motor carriers unquestionably has the power of the achievement of this end.

> *McLean Trucking Company v. U. S.*, 321 U. S., 370.

In the case at bar the Commission found in its first report, dated June 30, 1947 (Sheet 11):

> "There are 66 stockholders in the Applicant corporation. Fifty-eight of them are jobbers, distributors, dealers, or so-called agents engaged in buying or selling petroleum products. Most of these distributors and jobbers deal directly with the major oil companies. A few are so-called independents who secure their sup-

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plies in the open market. They are located at widely scattered points in the territory here under consideration. Although no single stockholder handles a large volume of petroleum products, collectively they handle a substantial amount. The petroleum industry is highly competitive. Insofar as the shipments bought and sold by the stockholders are concerned, they could control the routing. Because of their collective buying power, the stockholders would also be in a position to exert strong influence on the routing of all shipments made by the major oil companies in the Southeast. Other common carriers in the affected area would be at a serious disadvantage in competing for the traffic. Opportunity for preferential treatment of the stockholders, who would be shippers, is also apparent. No carrier should be in a position where it can directly or indirectly exert influence on the movement of traffic. Such a situation does not 'foster sound economic conditions in transportation and among the several carriers.' All common carriers should compete for available traffic on an equal footing. Applicant disavows any intention of conducting the proposed operation in a manner other than in strict conformity with the Act. Such disclaimer, although *bona fide*, is immaterial. Upon the facts of record, we find that the granting of the Application would be inconsistent with the public interest and the National Transportation Policy."

And in its second report, dated February 19, 1948, in reversing itself, stated (Sheet 7):

> "While it appears that other carriers may be at some competitive disadvantage, we are inclined to place more emphasis upon the possibility of injury to competing carriers."

All the substantial evidence shows that a large number of private carriers affiliated with the major oil companies have combined, seeking this certificate of public convenience and necessity with intent to control the trans-

supplying of an essential service than upon the

portation of this traffic within the territory. Appellant and other competing motor truck and railroad lines are, therefore, deprived of an opportunity to compete in an open market for transporting this traffic. The Commission in reversing itself and granting this certificate, in popular parlance, has truly put applicant **in the driver's seat**, and has put Appellant among that group of **small business men** who are fast becoming the **vanishing American of today**. Only in its magnitude, only in the greater opportunity offered Applicant to indulge in unfair practices and gross discrimination does this Application differ from many others which the Commission has condemned and rejected.

Shoemaker, Common Carrier Application, 44 M. C. C., 765;

Geraci, Contract Carrier Application, 7 M. C. C., 369;

Bales, Common Carrier Application, 9 M. C. C., 709;

Earle L. Erdner, Extension of Operations, Frozen Vegetables, 46 M. C. C., 818.

Differently stated, in all the other instances known in which a private carrier has sought authority to engage in carriage for hire the Commission has had to consider only that one carrier; here, to the contrary, concert of action by the stockholders of Applicant means that the Commission is, in fact, dealing with many private carriers seeking common carrier authority behind the false front of this Applicant. Through this device each of these private carriers will transport its own traffic, and at the same time, having withdrawn this proprietary traffic from the sum total available to transportation by appellant and other for-hire carrier protestants, will be able, through the strength gained from this amalgamation, to force the major

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oil companies to divert to them (doing business through this pseudo applicant) the greater part of the traffic of others, which but for this undue influence would be competitively open to them.

How can any scheme such as this be more openly in restraint of competition?

How can Appellant, together with the other for-hire protestant carriers, possibly compete for available traffic on an equal footing?

How under any conceivable circumstances can the footing be more unequal?

Unquestionably the Commission has exceeded its statutory limitations, has disregarded the declared policy of congress to prohibit "unfair or discriminatory practices" and has failed in the trust vested in it by Congress to guard against the danger of the development of a transportation monopoly.

U. S. v. Griffith, 334 U. S., 100;
American Tobacco Co. v. U. S., 328 U. S., 781, 809;
Standard Oil Co. of N. J. v. U. S., 221 U. S., 1, 61;
U. S. v. General Motors et al., 121 Fed. (2d), 376;
Certiorari denied, 314 U. S., 618; 314 U. S., 710.

The substantial evidence further shows that Applicant's stockholders also control Coastal Terminals, Inc., and that Applicant is selling tank semi-trailers to its members. Coastal Terminals, Inc., maintains a terminal for the storage and warehousing of bulk petroleum products at Charleston, S. C.

The Commission and Court below failed to consider the effect of the foregoing evidence in determining whether or not the granting of the Application would or would not

create a transportation monopoly, in violation of the National Transportation Policy and the Federal Sherman Anti-Trust Laws; nor was any explanation made or reason given for not considering such evidence.

Combinations to dictate the terms **and control the routing** under which transportation will be supplied are well-recognized trade practices which National legislation can and does prohibit (emphasis added).

(Cf.) *Gibony v. Empire Storage & Ice Co.*, Advance Sheet No. 12, 69 S. Ct., 684;
Grenada Lumber Co. v. Miss., 217 U. S., 433, 440-441;
Eastern States Retail Lumber Dealers' Ass'n v. U. S., 234 U. S., 600, 612-614;
Fashion Originators' Guild v. Trade Comm., 312 U. S., 457, 465;
U. S. v. Trans-Missouri Freight Ass'n, 166 U. S., 290, 324-325.

CONCLUSION

For the foregoing reasons it is evident that the appeal presents substantial questions. It is, therefore, respectfully submitted that the Appellee's motion to affirm be dismissed.

EDWARD W. MULLINS,

FRANK A. GRAHAM, JR.,

Attorneys for Appellant.

June ...., 1949.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CIVIL No. 2048

BEARD-LANEY, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States move that the decree of the District Court be affirmed.

This is a direct appeal from the final Decree,[1] entered on March 4, 1949 by a specially constituted District Court of three judges convened pursuant to Sections 2284 and 2325 of the Judicial Code as revised effective September 1, 1948 (28 U. S. C. 2284, 2325) dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on April 26, 1949, and appeal papers served on May 3, 1949.

The Commission's order, dated February 19, 1948, granted an application of Associated Petro-

[1] On the same date the Court also rendered an opinion and made findings of fact and conclusions of law.

leum Carriers for certain operating authority as a common carrier by motor vehicle of petroleum products, in bulk, in tank trucks, over irregular routes, from certain points in North Carolina, South Carolina, and Georgia to all points in those states. Appellant is one of a number of motor carriers who were protestants in the proceeding before the Commission, seeking to prevent the authorization of the competition which would result from granting the application.

Appellees submit that this appeal involves no substantial questions. Determination of the amount and character of transportation service required by public convenience and necessity is an administrative question to be determined by the Interstate Commerce Commission in the exercise of its expert judgment as the agency upon which Congress has conferred regulatory powers over the national transportation system; and after the careful examination of the record by the District Court, a second judicial scrutiny of the evidence to determine its adequacy to support the Commission's order would be a burdensome exercise of appellate review not required in the interest of orderly and efficient administration of justice.

Applicant's predecessor, War Emergency Cooperative Association (WECA), by virtue of temporary authority granted in 1942, has conducted operations equivalent to those authorized by the Commission's order. The predecessor organization was created at the instance of the Office of Defense Transportation. Findings by the Commission, quoted in the opinion of the court below, disclose that:

> the record fails to show any existing permanent common carrier authority to operate

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> from many of the sources of supply to the destination territory here involved . . . No common carrier service is shown to be available to serve the entire territory in which a definite need for service is established by shipper witnesses.

In sustaining the Commission's order the District Court said:

> The principal position of plaintiff is that there are no adequate findings of fact upon which to base the order of the Commission and no sufficient evidence to support such findings; but we think that this position is wholly lacking in merit. The portions of the last report, which we have quoted above, are certainly sufficient, when taken in connection with the detailed findings of evidentiary facts preceding them, as findings that the service which applicant proposes to render is needed by the public, that it cannot be furnished by other carriers operating within the territory and that it will not result in destructive competition hurtful to the public interest. We may not ignore these findings because made in the form of a narrative order, rather than in separately numbered paragraphs as formerly required by Equity Rule 70½ or Rule 52 of the Federal Rules of Civil Procedure, since these have no application to the Commission. Chicago, B. & Q. R. Co. v. United States, 60 F. Supp. 580, 584; United States v. B. & O. R. Co., 293 U. S. 454, 464.
>
> There can be no question that the evidence before the Commission amply supports its findings. Witness after witness testified as to the need for the service; documentary evidence shows that the operating authority of the protesting carriers is so limited that they cannot serve the territory allotted to applicant; and the fact that WECA is now handling such a large portion of the traffic is sufficient basis

for the finding that the substitution of applicant in its place will not result in competition hurtful to the public interest.

We are not impressed by the argument that, because it is not shown that protestants could not increase their facilities to take care of the need which would arise upon the withdrawal of WECA, there is no basis for granting a certificate to applicant. As stated above, protestants were not authorized to render service throughout the territory; and, quite apart from this, there is nothing in law or in reason which requires that the Commission permit those already in the field to absorb the business which would be relinquished by WECA rather than give the public the benefit of the competition which would result from the licensing of applicant.

In the light of the facts in the case at bar, the District Court's holding is amply sustained by the leading cases cited in its opinion. These authorities demonstrate that Congress has conferred upon the Commission the task of deciding what transportation service will best serve the public interest. Both the kind and quantity of transportation required are to be determined by the Commission in the exercise of its expert judgment. The Commission is vested with a wide range of administrative discretion; no particular factors are specified by the statute as controlling; in particular it is not necessary that the Commission make a finding with respect to the inadequacy of existing carriers or their inability to expand or improve their services so as to handle all available business. On the contrary, the power to authorize additional service is one of the weapons in the Commission's arsenal; and indeed, such new service may be established for the very purpose of creating competitive condi-

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tions and affording to the public the benefit of the stimulus thus provided. This construction of the pertinent statutory provisions is established by a long line of controlling authorities.[2]

In any event, whatever view be taken with respect to the scope of the Commission's authority to authorize the initiation of new competition,[3] it should be noted that in the case at bar the Commission's order would have to be sustained even if a more restrictive view were taken than is warranted by the pertinent decisions. For in the case at bar the record discloses that the service of existing carriers was in fact inadequate; and furthermore that applicant's operations will not in

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[2] *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60; *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35; *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215 (E. D. Pa., 1942), aff'd 317 U. S. 587; *North Coast Transportation Co.* v. *United States*, 54 F. Supp. 448 (N.D. Calif., S. D., 1944), aff'd 323 U. S. 668; *Carolina Scenic Coach Lines* v. *United States*, 56 F. Supp. 801 (W.D.N.C., 1944), aff'd 323 U. S. 678; *Crichton* v. *United States*, 56 F. Supp. 876 (S.D.N.Y., 1944), aff'd 323 U. S. 684; *A. B. & C. Motor Transp. Co.* v. *United States*, 69 F. Supp. 166 (D. Mass., 1946); *Lang Transp. Corp.* v. *United States*, 75 F. Supp. 915 (S.D. Calif., Cent. Div., 1948).

[3] It is clear that under federal law the carriers first in business within a particular area do not enjoy legal protection against competition subsequently arising. The Interstate Commerce Commission has power to authorize any number of different carriers to operate within the same territory. The rule applicable in federal courts applying the statutory standards established by Congress in the Interstate Commerce Act affords less protection to existing carriers, and empowers the Commission to exercise greater discretion in authorizing the institution of new or additional operations, than is the case under state law in some jurisdictions. *Indian Valley Railroad Co.* v. *United States*, 52 F. (2d) 485, 487 (N.D. Cal., 1931), aff'd 292 U. S. 608; *Pennsylvania Railroad Co.* v. *United States*, 40 F. (2d) 921, 925 (W.D. Pa., 1930); *Lang Transportation Corp.* v. *United States*, 75 F. Supp. 915, 930-1 (S.D. Calif. Cent. Div. 1948).

fact result in new competition, but merely in the continuance of the service furnished by its predecessor organization under temporary authority.[4]

Nor is any substantial question raised by appellant's further assertion in its jurisdictional statement: "The case is unusual in that upon the same record the Commission reached two contradictory conclusions." No significance attaches to the fact that the Commission's order on rehearing reversed the order unfavorable to applicant made by Division 5 on June 30, 1947, and reinstated the conclusions reached by the joint board which first passed upon the case. In the exercise of judicial review the courts are concerned only with the administrative agency's definitive and final determination, and not with preliminary stages or preparatory steps in the administrative proceeding. *B. & O. Ry Co.* v. *United States*, 298 U. S. 349, 370-1; *Federal Radio Commission* v. *Nelson Brothers*, 289 U. S. 266, 285-6. This contention of appellant is sufficiently disposed of by the following language from the opinion of the court below:

> The rules to be applied in reviewing the order of the Commission are not different because that order resulted from a reversal of a prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of the division, which received the approval of the Commission, was the final and definitive action of the Commission, which is what we are authorized to review;

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[4] Actual patronage by the shipping public of past operations, even if such operations were unauthorized or illegal, is evidence which the Commission may consider as proof of public convenience and necessity. *Crichton* v. *United States*, 56 F. Supp. 876 (S.D.N.Y., 1944), aff'd. 323 U. S. 684.

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> and it is to be reviewed in the same way and under the same limitations as other reviewable orders. We may not substitute our judgment for that of the Commission because upon a rehearing and fuller consideration of the facts it has arrived at a different conclusion from that which its hearing division had first expressed. Lang Trans. Co. v. United States, 75 F. Supp. 915, 925.

Finally, appellant's contention that operating authority should not have been granted to the applicant because applicant stockholders are engaged in the petroleum business is equally unsubstantial. If, as appellant intimates, control of transportation facilities can be used by the oil companies to monopolize the petroleum industry, such action remains amenable to the antitrust laws and is not immunized by the Commission's action in granting operating authority as a carrier to the applicant.[5] While it is the duty of the Commission to consider and give appropriate weight to the policy of the antitrust laws as an element or ingredient of public convenience and necessity,[6] it is plain that the Commission sufficiently discharged that duty in the instant case, as stated by the Court below:

> This, however, is a matter to be weighed by the Commission along with other matters in determining what is required by public convenience and necessity; and the reports of the Commission show that it was given full consid-

[5] The order in the instant case differs in this respect from orders approving mergers under Section 5 of the Interstate Commerce Act (49 U.S.C. 5) or approving rate-fixing agreements under the so-called Bulwinkle Bill now constituting Section 5a of the Act.

[6] *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80, 86; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 76; *National Broadcasting Company* v. *United States*, 319 U. S. 190, 223.

eration and weighed against other matters deemed of greater importance in arriving at a conclusion. In this connection it is to be noted that the prohibition of 49 USCA 1(8) against transporting property owned by the carrier applies only to railroads and that an effort to amend it so as to make it applicable also to motor carriers was made when the Transportation Act of 1940 was under consideration by Congress but was abandoned. See United States v. South Buffalo R. Co., 333 U. S. 771, 776, 790 and note 10 on 790. There is nothing in the law, therefore, which forbids a motor carrier to transport commodities which it owns; and, even if there were, such provision would not prohibit the transportation of property owned by stockholders (United States v. South Buffalo R. Co., supra) and would furnish no compelling reason which would preclude the granting of a certificate of convenience and necessity where in the opinion of the Commission the public interest required it.

For the foregoing reasons, it is evident that the appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(S.) PHILIP B. PERLMAN,
Solicitor General.

(S.) DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

MAY, 1949

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 137

BEARD-LANEY, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ASSOCIATED PETROLEUM CARRIERS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION OF ASSOCIATED PETROLEUM CARRIERS TO AFFIRM

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Attorneys for Associated Petroleum Carriers.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 2048

BEARD-LANEY, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ASSOCIATED PETROLEUM CARRIERS,

Defendants

MOTION OF ASSOCIATED PETROLEUM CARRIERS TO AFFIRM

Associated Petroleum Carriers, one of the defendant-appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of Oct. 22, 1913 dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. Findings of fact and conclusions of law, and the judgment and decree of the court, were entered on March 9, 1949, and appeal papers were served on April 29, 1949.

This movant adopts the statement of facts and the reasoning and argument contained in a similar motion which is being made simultaneously by the Interstate Commerce Commission, defendant-appellee, and, in addition thereto, respectfully submits the following arguments:

We submit herewith our analysis of the assignments of error filed by the appellant for the purpose of showing that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument as authorized by Rule 7(4).

Assignments Nos. 1, 2, 9 and 10

All of these assignments are pointed toward the contention that the Commission and the Court below did not make the basic findings necessary for their ultimate finding of convenience and necessity, and that none of their findings is supported by substantial evidence and hence the decision is arbitrary and unreasonable.

In answer to this contention we list the following as being among the many basic findings of the Commission and the Court below that do support the ultimate finding of convenience and necessity:

> The Commission found that "many of the larger oil companies have storage tanks at some of the pipeline outlets, but none has storage facilities at all of the outlets . . . and in many instances (gasoline of such oil companies) will not be available at the nearest outlet."
>
> The Commission went carefully into the problem of the quantity of gasoline transported in the territory under consideration, and pointed out that during the year ended May 31, 1945, WECA had transported over 77,000,000 gallons from Savannah, over 65,000,000 gallons from Wilmington and over 23,000,000 gallons from Charleston.

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The Commission found that one of the shippers in the territory under consideration would, in all likelihood, distribute 2,000,000 gallons of gasoline per month.

The Commission found that during the six-week period immediately preceding the hearing WECA transported more than 39,000,000 gallons of gasoline.

In its first decision the Commission found that WECA transported more than 350,000,000 gallons of gasoline during the twelve months preceding May 31, 1945.

The Commission found that "no common carrier service is shown to be available to serve the entire territory in which a definite need for service is established by shipper witnesses, nor is it shown that existing carriers can absorb the substantial tonnage transported by WECA in the territory involved."

The Commission found that only five of the protestants have certificates of public convenience and necessity authorizing operations within a part of the territory here involved.

The Commission analyzed the authority of these common carriers as well as their equipment, and whether or not they could perform additional service, and concluded that the protestants had neither the authority nor the equipment to meet all of the needs of the territory involved.

The Commission found that none of the existing carriers in this territory that had the capacity to handle additional traffic were authorized to operate from the following key points: Charleston, Morehead City, New Bern or Brunswick, or any of the pipeline terminals on the Plantation pipeline, except that one had limited authority to operate from Thrift and Camp Croft.

The foregoing are only a few of the basic facts that the Commission found. An examination of the opinions of the Commission and the Court will show that ample basic

facts were found to meet the requirements of the decisions of this court.

Included in the above assignments of error is the contention that the findings of the Commission are not supported by substantial evidence. We respectfully submit that, on the contrary, there was ample evidence to support all of the Commission's findings. It would be tedious beyond words for us to thread through the enormous record and multiplicity of exhibits in this case and show how completely the Commission's basic findings are supported by evidence. A few illustrations will suffice:

> The Commission's opinion is full of facts and figures regarding the quantity of petroleum products hauled from various ports and pipeline terminals. Obviously the Commission did not imagine these facts; these facts were clearly proven by evidence that was duly presented.
>
> In its opinion the Commission specifies facts regarding various shippers, and the experience of these shippers is gone into in detail. Reference to the record will show that these shippers, and others associated with them, testified to the facts which the Commission found.
>
> At one point the Commission says that operators of bulk plants, gasoline filling stations, bus line operators and other large consumers of petroleum products located generally throughout the area supported the application. Obviously this finding is based upon the testimony of these operators of bulk plants, gasoline filling stations, bus lines and the other consumers.
>
> The Commission found that few of the receivers of petroleum products supporting the application have storage facilities of sufficient size to accommodate carload shipments. An examination of the record shows that these receivers of petroleum products gave ample testimony to this effect.

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The operating authority of each protestant was placed in evidence by means of exhibits. On this point there were eleven exhibits in all.

The Commission found the exact number of tractor-trailer tank trucks that were being operated by the three principal common carrier protestants in this area. The record shows that this number of tractor-trailer tank trucks was not dreamed up by the Commission, but the finding was based upon direct evidence.

At one point the Commission says that a witness "expressed the opinion that it would be necessary for them (his firm) to purchase a large fleet of trucks to handle their business in the event the service proposed by applicant was not available." Obviously this witness testified.

The above are only a few instances of the many that we could point out where the findings of the Commission are necessarily based upon substantial evidence. In other words, the opinion of the Commission itself contains ample internal evidence of the unsubstantiality of the plaintiff's contention.

Assignment No. 3

This assignment is unsubstantial because it does not take account of the authority of the Commission in such cases as was so well stated in *Virginia Stage Lines* v. *United States*, 48 Fed. Supp. 79, as follows:

> "This is in accord with the realization that the regulation of transportation involves various economic factors and the exercise of an empirical judgment since the stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being

responsive to the dynamic character of transportation problems."

Assignments Nos. 4 and 5

These are blanket assignments of error and are not sufficiently definite to enable either the court or the appellees to understand what the appellants have in mind.

Assignments Nos. 6 and 7

These assignments of error are so unsubstantial as to come within the classification of frivolous. The Court below, in recounting the facts and the procedural history of the case, mentioned merely in passing, at the end of the second paragraph, that only one of the original fourteen motor carrier protestants had brought this action, and in that connection pointed out that the appellant had a license to transport from only seven of the twenty-six points of origin within the territory. Those statements do not appear anywhere else in the opinion and do not appear to have been the basis of the Court's decision.

Assignment No. 8

In this assignment of error the appellant complains that in its discussion of the case the Court below referred to the findings of the Joint Board, claiming that in the procedural set-up for cases of this sort established by Congress the Joint Board is merely an inanimate "conduit." We respectfully submit that the appellant underrates the importance of the Joint Board. It is clear that in cases of this sort Congress has called on the Utilities Commissions of the States involved in pursuance of the policy of decentralization of governmental affairs which has proven so wise. In the case at bar the Joint Board that heard the testimony of the witnesses was a blue ribbon joint board, composed of commissioners themselves (not repre-

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sentatives of the Commissions) of North and South Carolina and Georgia. It is a matter of great gratification to this movant that these eminent men, charged with the serious responsibility of administering to the needs of the citizens of the three States involved, found for the applicant. In this connection, it is worth noting that the Utilities Commission of each of the three States involved has awarded to the applicant intrastate authority to perform within the borders of the respective States this service which the Commission's opinion authorizes it to perform.

It is a part of the National Transportation Policy (Title 49, U. S. Code, just ahead of section 1) that it is the policy of Congress "to cooperate with the several states and the duly authorized officials thereof". We submit that it is in line, therefore, with the National Transportation Policy for the Commission and the Courts to take serious note of what the Joint Board said.

Assignment No. 11

Candidly, it seems to us that this assignment of error is, from a legal standpoint, utterly meaningless. Apparently the appellant did not like the Commission's opinion and does not like the Court's opinion, and uses this assignment of error to express its dislike.

Assignment No. 12

This assignment of error seems to say that there was no reason for the Court below to find that the documentary evidence showed the limit of authority of the protestants when, according to the appellant, the Commission failed to find that an actual need for service existed "from any or all points of origin to any or all points of the destination territory". The difficulty with the appellant's position is that the Commission did expressly find that such

an actual need existed. As a matter of fact, sheets 3 through 7 of its last opinion are devoted to the single and solitary purpose of showing the existence of this need.

Furthermore, we call attention to the fact that the statement of the Court below regarding the documentary evidence is a part of an entire paragraph which should be considered as a unit, and which is as follows:

> "There can be no question that the evidence before the Commission amply supports its findings. Witness after witness testified as to the need for the service; documentary evidence shows that the operating authority of the protesting carriers is so limited that they cannot serve the territory allotted to applicant; and the fact that WECA is now handling such a large portion of the traffic is sufficient basis for the finding that the substitution of applicant in its place will not result in competition hurtful to the public interest."

Assignment No. 13

The exact finding of the Commission in the second and third paragraphs beginning on sheet 7 of its Feb. 19, 1948 decision is:

> "It does not appear that the present competitive relation as it now exists between WECA and protestants would be materially changed by applicant entering the field in place of WECA. . . . The record is replete with evidence that WECA has been supplying a service upon which the shipping public relies and that this service cannot be withdrawn through denial of this application without detriment to the shipping public."

WECA has admittedly been in operation ever since the Spring of 1942, which means that it has been in operation for almost seven years. There is no evidence that its competition has driven the appellant out of business or unduly prejudiced it. As a matter of fact, all of the fifteen original

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protestants before the ICC are still in business and there is no evidence that any of them has been unduly prejudiced by WECA's operation.

As a matter of fact, the record shows that WECA is the only common carrier of petroleum in this territory that actually serves the public generally. The record shows that most of the principal protestants devote practically their entire equipment to servicing the big oil companies. For example, the appellant devotes most of its services and equipment to Standard Oil Company of New Jersey and the Gulf Oil Company.

Assignment No. 14

By this assignment of error the appellant asserts that the Commission made no finding that there would be any interstate business relinquished by WECA, that the Commission made no finding that the public needed the services of the applicant in place of WECA and, therefore, the appellant contends the Court below was in error in finding that it would be in the interest of the public for the applicant to have a chance at taking over the business now handled by WECA. We submit that this assignment of error is a conglomerate of error itself.

Obviously the Commission did make a finding that interstate business would be relinquished by WECA when it goes out of business because the Commission goes to great lengths to show the amount of gallonage interstate that WECA is now transporting. It would seem to be plain beyond the necessity of argument that if WECA is now transporting enormous quantities of petroleum in interstate commerce, such business will be relinquished when WECA ceases to exist.

Equally fallacious is the appellant's contention that the Commission did not find that the public needs the appli-

cant as a substitute for WECA. As pointed out above, sheets 3 through 7 of the Commission's last opinion are devoted to showing the existence of this need.

The Court was clearly on sound ground to hold that it was within the power of the Commission to give the applicant a chance at getting the business that would be relinquished by WECA under all the facts and circumstances of this case.

Assignment No. 15

This assignment of error also properly comes within the classification of being frivolous. In discussing the procedural history of the case, the Court naturally pointed out that the Commission had reheard its first decision and reversed itself. The Court below, being well acquainted with the habits of judicial and quasi-judicial bodies, took judicial notice of the fact apparently that whenever any judicial or quasi-judicial body reverses itself, it does so only after giving the matter most serious consideration. Furthermore, it was not necessary for the court below to point out why the Commission, in its second opinion, reversed its first opinion.

Assignment No. 16

The appellant clearly misconceives both the language and the meaning of the National Transportation Policy. As we read the National Transportation Policy it contains nothing to support the appellant's contention that competition among carriers shall be kept to the minimum. The only language in the National Transportation Policy that could, by any sort of stretch of the imagination, be considered to relate to competition is that part which says that it is the policy of Congress "to promote safe, adequate, economical and efficient service and foster sound

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economic conditions in transportation and among the several carriers."

The Commission recognized that there would be competition among the various carriers in this territory, which would, of course, include competition between the applicant and the other carriers. There is no finding, however, and, as a matter of fact, no evidence to support a finding that sound economic conditions in transportation will not be promoted by the continuance in this territory of the WECA operation which has proven so helpful for seven years.

Also in discussing the National Transportation Policy the appellant seems to overlook the concluding words which are to the effect that everything in the National Transportation Policy shall look toward the establishment and maintenance of transportation "adequate to meet the needs of the commerce of the United States." No one can read the opinion of the Commission or the Court and conclude other than that both the Commission and the Court have found that by granting the applicant's petition for franchise there will be provided within the territory under consideration petroleum carrier service adequate to meet the needs of the commerce involved.

Assignments Nos. 17 and 21

These two assignments of error relate to a fragment of one sentence which the appellant has torn from its context and which it now uses as the basis of these assignments of error. The Court will find the sentence in question in the second paragraph that commences on sheet 7 of the Commission's last decision. The whole sentence reads as follows:

> "Generally speaking, there is no claim by anyone that a new service is now needed, but the record is

replete with evidence that WECA has been supplying a service upon which shipping public relies and that this service cannot be withdrawn, through denial of this application, without detriment to the shipping public."

Obviously the "new service" that the Commission refers to is some new service in addition to the service that WECA has been performing. The Commission, in this sentence, is considering the WECA service as an old established service, and says that no new service, in addition to that old established WECA service, is needed. It appears to us that the appellant, by taking from this sentence a portion thereof, is trying to torture the language of the Commission in meaning something that the Commission clearly did not intend.

Assignments Nos. 18, 19 and 20

The unsubstantiality of these assignments of error is clearly demonstrated by the Court's opinion. The whole matter as to whether or not the commodities clause, or anything like it, is applicable to motor carriers was discussed in *U. S.* v. *South Buffalo Railroad Co.*, 337 U. S. 371. Especially see Note 10 on page 790.

In view of the foregoing, the appellee, Associated Petroleum Carriers, respectfully submits that the decree of the District Court should be affirmed on this motion.

(S.) C. W. Tillett,
(S.) L. A. Odom,
(S.) Joseph H. Blackshear,
(S.) Frank J. Bostick,
Attorneys for Associated Petroleum Carriers.

May 12, 1949.

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No. 137. BEARD-LANEY, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of South Carolina. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *Edward W. Mullins* for appellant. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States et al.; and *C. W. Tillett* and *Joseph W. Blackshear* for the Associated Petroleum Carriers, appellees. Reported below: 83 F. Supp. 27.